

WE being well satisfied of the Learning
and Judgment of the Author, do
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the Reports of *Thomas Carthew*, late Ser-
jeant at Law.

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REPORTS OF CASES

ADJUDGED in the
Court of King's Bench,
FROM THE

Third Year of King JAMES the Second,
to the Twelfth Year of King WILLIAM the Third.

England - Court of KB - Reports

By **THOMAS CARTHEW,**
late Serjeant at LAW.

*With two TABLES, the one of the Names of the
Cases, the other of the Principal Matters therein con-
tained.*

Published by his Son **THOMAS CARTHEW,**
of the Inner Temple, Esq;

In the SAVOY:

Printed by E. and R. NUTT, and R. GOSLING, (Assigns of E. Sayer, Esq;) for R. Gosling and J. Hooke in Fleet-street, and Tho. Ward in the Inner Temple Lane. M DCC XXVIII.

11

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in the Inner Temple Lane. M DCC LXXVIII

THE DEDICATION.

To the Right Honourable
PETER
LORD KILNG,
Baron of OCKHAM,
Lord High CHANCELLOR of
GREAT BRITAIN.

MY LORD,

I Presume to beg your Lordship's Patronage for this Volume of Reports collected by my late Father Serjeant *Carthew*, not only from the exalted Post in which your Lordship justly presides over the Laws of *England*, or from your Lordship's well known Humanity and Easiness of Access; tho' both sufficient Motives of themselves; but likewise because I am well assured the Reporter himself, who had the Happiness to be very much known

A

July 2d.
1728.

Page 429
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63

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353

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Ballard

The DEDICATION.

known to your Lordship, (was he now living) would have been Proud to have a Work of His adorned with Your Lordship's Name, and come into the World under that Protection. These Reports, which are truly genuine, I did not Design should have ever seen the Light; but I have lately been prevail'd upon, by the Importunity of some Persons of Judgment, to print them, who assure me that they may be useful to the Professors of the Law; and then I thought it my Duty no longer to conceal what might in any Degree be serviceable to the Publick Good. If your Lordship shall condescend to be of the same Opinion, it will be the greatest Satisfaction to me, who am Proud of this Opportunity of professing my self,

MY LORD,

Your LORDSHIP'S

July 3d,
1728.

Most devoted and most

Obedient humble Servant,

Tho. Carthew.

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D E

Term. Sanct. Trin.

3 Jac. II. in Banco Regis.

Rogers *versus* Mayhoe. Hill. 2 & 3 Jac. II.
Rot. 126.

THE Plaintiff brought an Action of Debt on a Judgment obtained in B. R. and the Defendant pleaded in Bar, that he ante diem impletoris Billæ prædictæ had brought a Writ of Error on that Judgment which was still depending; and upon a Demurrer to this Plea it was adjudged, that this Matter could not be pleaded in Bar, tho' it might be pleaded in Abatement, as may be seen in the Case next following; and thereupon the Plaintiff had Judgment.

Writ of Error depending, cannot be pleaded in Bar to an Action of Debt on a Judgment.

Aby *versus* Buxton. Hill. 2 & 3 Jac. II.
Rot. 116.

THIS was likewise an Action of Debt on a Judgment had in B. R. and the Defendant pleaded in Abatement, that he ante diem, &c. had brought a Writ of Error on that Judgment which was still depending, and upon a Demurrer to that Plea, it was adjudged that the Writ should abate.

Where it was pleaded in Abatement.

The Reporter makes a Quære in this last Case, and refers to the Case of Rottenhoffer *versus* Lenthall, where

B

it

* Rowley
versus Rey-
ston. Trin.
7 Will. B. R.
Rot. 390.
Dyer 32.
Cro. El. 557.
2 Vent. 261.
3 Lev. 396.
Raym. 100.
1 Mod. 121.
Sid. 236.

It was adjudged to the contrary, (viz.) that a Writ of Error depending is no good Plea to an Action of Debt on a Judgment; and cited a * Case where, in an Action of Debt on a Judgment, the Defendant pleaded a Writ of Error depending, neither in Abatement, nor in Bar, but concluded his Plea thus, (viz.) Petit, &c. if he should be compelled to make any farther Answer, pending that Writ of Error, and this was adjudged ill; and the Defendant was ruled to answer over.

Doyley versus Walker. Hill. 2 & 3 Jac. II.
Rot.

SCire Facias against an Executor (upon a Judgment in Ejectment against his Testator) quare plenariam possessionem, &c. & Executionem de damnis, &c. habere non debet, the Defendant pleaded a frivolous Plea, to which the Plaintiff demurred.

And now the Counsel for the Defendant waived the Plea, and took Exceptions to the Writ, (viz.) because the Defendant who was Executor is not named, or set forth in the Writ; to be Certenante of the Lands recovered; and it shall not be intended that he was, because a Defendant in Ejectment is always supposed to be a Disseisor, and that by his Death the Lands descend to his Heir at Law; and therefore for Default of this Allegation, the Plaintiff cannot have Judgment for the Possession, or Damages, because the Writ being not good for Part, is bad for the Whole.

Curia.

The Court inclined to that Opinion, which the Plaintiff perceiving, brought a new Writ of Sci' fa', and mended the Fault.

But the Reporter was of Opinion, that the Plaintiff in this Case might pray to have Execution, &c. (suo periculo) and for this see 3 Cro. 872. so where a Sci' fa' is brought to have Execution of Seisin, &c. upon a Judgment in a real Action, and the Tenant is warned, and pleads Non-Tenure.

Renew

Renew *versus* Axton. Hill. 2 & 3 Jac. II.
Rot. 708.

THIS was a special Action on the Case on a Bill of Exchange brought by the Indorsee against the Drawer.

Statute of Limitations, a good Plea to an Action brought on a Bill of Exchange.

The Defendant Protestando, that the said Bill of Exchange did not concern Merchandize between Merchants, their Factors or Servants, pro placito quod ipse non assumpsit super se infra sex annos, &c.

The Plaintiff demurred to this Plea, supposing a Bill of Exchange to be a Specialty, and so not within the Statute of Limitations; but the Court was of another Opinion, (viz.) that it was a good Plea, and so gave Judgment for the Defendant.

Dickens *versus* Greenvill. Hill. 21 & 22
Car. II. Rot. 1107.

IN Ejectment a special Verdict was found, which depended in Argument until Easter-Term, 3 Jac. 2. at which Time the Term set forth by the Plaintiff in his Declaration expired; and thereupon the Court was moved for a Rule to enlarge the Term, and the Defendant was required to consent, which he refusing, the Court, upon producing several ancient Rules made in such Cases, did * enlarge the Term, without the Consent of the Defendant.

In Ejectment, the Term expired; pending the Action, a Rule was made to enlarge * See the Case of Hutchins it. *ver. Bassett contra.*

Smith *versus* Tonstall. Hill. 2 & 3 Jac. II.
Rot. 69.

IN a special Action on the Case, the Plaintiff declared as Administrator durante minore ætate of R. S. Executor of the last Will and Testament of R. S. his Father, setting forth, that the Testator R. S. in his Life-Time had obtained a Judgment for 100 l. against W. S. who was likewise indebted to the Testator in another 100 l. for Rent; and that after the Death of the said Testator, the Plaintiff had Judgment on a Scire facias to have

Action will lie against the Defendant for confessing a Judgment by Fraud.

Execution, &c. and that he intending to take out Execution, and also to bring an Action of Debt for the Rent in Arrear, (the said W. S. being then possessed of Goods and Chattels sufficient to discharge the Whole) which being very well known to the Defendant, he of his Malice and Covin with the said W. S. did conspire to defeat the Plaintiff of his Execution, and of recovering the Money for Rent Arrear, procured the said W. S. to confess a Judgment for 160 l. (of such a Term) to one W. N. who revera the said W. S. did not owe any Thing to the said W. N. and that he sued out Execution upon this feigned Judgment, by Virtue whereof he seized all the Goods and Chattels of the said W. S. which he removed to Places unknown, and converted to his own Use, by Reason whereof the Plaintiff lost his Debt.

The Defendant demurred to this Declaration for Matter in Law, supposing that this Action would not lie; but it was adjudged that the Action would lie, and thereupon the Defendant Tonstall brought a Writ of Error in Parliament, where the Judgment was affirmed.

Fortune *versus* Manucaptors of Davis. Hill.
2 & 3 Jac. II. Rot. 73.

Incertainty
in a Replication
makes
it ill.

SCire Facias upon a Judgment obtained against Davis (the Principal) to have Execution against his Bail, who plead Executio non, &c. quia dicunt quod ante emanationem predicti primi Brevis de Scire facias, and before the Issuing forth alicujus Brevis of Ca. sa. against the Principal, he (the Principal) died; & hoc, &c.

* See 6 H.
7. 6. how
such a Traverse
ought
to be taken.

The Plaintiff replied, that the Principal is living, (viz.) at H. in the County of, &c. and * traversed, that he died before the Issuing forth of any Ca. sa. and upon a Demurrer to this Replication it was objected, that the Plaintiff had traversed the Death of the Principal ante emanationem predicti Brevis de Ca. sa. when there was no such Writ set forth by the Defendants in their Plea; but only a general Allegation, (viz.) ante emanationem alicujus Brevis de Ca. sa. which is incertain; therefore the Plaintiff in his Replication ought to have set forth the certain Time when the Ca. sa. issued against the Principal; and that the Sheriff returned non est inventus; like
Debt

Debt on a Bond for Performance of Covenants in an Indenture; the Defendant cannot plead Performance generally without setting forth the Indenture.

And for this Reason the Replication was adjudged Curia ill; and the Court being ready to give Judgment, the Plaintiff prayed Leave to discontinue, which was granted.

Evans *versus* Cramlington. Pasch. 2 Jac. II.
Rot. 192.

THIS was a special Action on the Case brought up on a Bill of Exchange; which was thus: The Defendant Cramlington drew a Bill of Exchange for 500 l. upon one Rider, payable at 25 Days Sight to one Price, or Order, for the Use of one Calvert; Price endorsed this Bill to the Plaintiff Evans, which was accepted by Rider, but he did not pay the Money on the Day; and thereupon the Plaintiff Evans who was the Endorsee brought this Action against Cramlington the Drawer.

2 Vent. 309.
S. C.
Action on a Bill of Exchange against the Drawer brought by the Endorsee.

The Defendant Cramlington (after Oyer of the Bill) pleaded that Calvert (who was named the Cestui que Use in the Bill) was an Officer in the Excise, and indebted to the King in such a Sum, and that upon an Exchequer Process at the Suit of the King, this 500 l. was extended in his hands.

And upon a Demurrer to this Plea, there were two Points made:

1. Whether by the Words of the Bill, Calvert had such an Interest in the Money, that before it was paid to Price, or Order, it might be extended as the proper Goods of Calvert, for his Debt due to the King; or whether he had only an equitable Right to receive and have the Money after it was paid to Price.

2. Whether Price had such an Interest in the Money by the Words of this Bill, that he might lawfully indorse and assign it to another by the Custom of Merchants; or whether he had only a bare Authority to receive it for the Use of Calvert.

And afterwards in Easter-Term, 1 Will. it was adjudged by the Chief Justice Holt and the Court for the Plaintiff; because Calvert had only an equitable Interest, and not a lawful one, to have the Money; for he could not maintain an Action on this Bill against Rider.

Besides

Besides the Endorsement of it by Price to Evans, (the Plaintiff) was for Value received of the Plaintiff by Price, and so he received that very Money to which Calvert had an Equity; and therefore he was responsible in Equity to him; but the Sum demanded by the Plaintiff Evans is not that Sum, but another due to him for Value received, in which Sum Calvert was not concerned; and for these Reasons the Money now in Demand was not extendable; and therefore this Plea was adjudged ill.

Afterwards the Defendant brought a Writ of Error in the Exchequer-Chamber upon this Judgment, and in Easter-Term, 2 Will. &c. the Judgment was affirmed.

The King *versus* Baker.

The Court of King's Bench never gives Judgment upon a Conviction in another Court.

See the King v. Baker, 2 H. G. 2.
THE Defendant was indicted and convicted at Kingston upon Hull, for speaking seditious Words, &c. and the Proceedings being removed into B. R. by Certiorari, the Court was moved to give Judgment.

But this Motion was opposed, because it was irregular, for the Court of King's Bench never gives Judgment upon a Conviction in another Court; but the Practice is, if, (after Issue joined in another Court) and the Indictment is removed, the Party is always admitted to waive the Issue below, and to plead de novo, and to go to a Trial upon an Issue joined in this Court.

The Court directed a new Trial, and Baker was found guilty by a second Verdict.

Jefferies, Mayor of London, *versus* Watkyns.
 Hill. 3 Jac. II. Rot.

3 Mod. 161.
 S. C.
 A Fault in the Declaration cured by the Verdict.

AN Action upon the Custom of London against the Defendant being no Freeman, but a Merchant Stranger, for not weighing Goods, &c. at the common Beam.

After a Verdict (but against Evidence) for the Plaintiff, it was moved in Arrest of Judgment, that the Plaintiff had set forth in his Declaration a Custom, that in Consideration the Mayor, &c. and their Predecessors at their proper Charge had maintained a Common Beam
 2
 Time

Time out of Mind for weighing Goods, and Servants to attend, &c. all foreign Merchants, who should import any Goods or Merchandize to be sold by Weight, nisi fuerant to bring them to this Beam to be weighed, and to pay so much for every hundred Weight; and assigned for Breach, that the Defendant at such a Time had imported so many Barrels of Raisins, &c. which he had sold without bringing them to the Beam to be weighed.

Now the Objection was, that the Plaintiffs had not well applied the Custom to the present Case; because they did not aver that the Barrels of Raisins thus imported were such Goods as were sold by Weight; for the Sale of Goods not usually sold by Weight, is no Breach of the Custom, upon which this Declaration was founded.

Yelvert. 36.
2 Cro. 220.
406.
2 Brownl.
177.
March 12.
2 Sand. 175.
Sid. 202, 203.

It was likewise objected, that the Plaintiffs had not alleged, that the Defendant had not paid the customary Toll for weighing; for if he had paid it secundum ratam, it had been good to discharge him from the Formality of weighing at these Beam.

But three Judges against Justice Allibon were of Opinion, that these Faults were cured by the Verdict.

Chorley *versus* Haslewood, on the Crown-side. Pasch. 3 Jac. II. Rot. 260.

ERROR to reverse an Outlawry in B. R. and the Error was assigned per Attornatum, without a special Rule of Court for that Purpose; and this being objected against the Writ, a Difference was taken to maintain the Practice, (viz.) where the Error appears upon the Face of the Record, it may be assigned well enough per Attornatum, and to prove it there was a Case cited, 4 Leon. 22. but no Opinion was given in the principal Case.

Error to reverse an Outlawry was assigned per Attornatum, not good.

Hacket *versus* Herne. Mich. 36 Car. II. B. R. Rot. 214.

3 Mod. 134.
S. C.

IN an Action of Debt on a Mutuatus, brought in the Common Pleas by Herne against Father and Son, the Plaintiff had Judgment against both; and now the Son alone

Judgment against several, and a Writ of Error by one, not good

alone brought a Writ of Error in B. R. and upon a Demurrer to the Writ, it was quashed, because both of them ought to join in this Writ; and if one of them should refuse, he should be summoned and sequestered: Now where there is Judgment against several, if one alone should be permitted to bring a Writ of Error, this * Inconvenience must necessarily ensue, (viz.) that every Defendant might bring a Writ of Error by himself, and by that Means delay the Plaintiff from his Execution for a long Time; and from having any Benefit of his Judgment, tho' it might be affirmed once, or oftner.

* Yel. 208.
2 Cro. 93,
94.
3 Cro. 314.

Lake *versus* Raw. Trin. 3 Jac. II. Rot.

Executor
pleaded,
that his Te-
stator enter-
ed into a
Bond, but
did not say

DEBT against an Executor, who pleaded, That his Testator entered into a Bond in such a Penalty to T. S. conditioned to pay so much Money, which was not yet paid, beyond which he had not Assets.

pro vero & justo debito, yet good.

To this Plea the Plaintiff demurred specially, and shewed for Cause, that the Defendant did not aver (as he ought) that the Bond was entered into by the Testator *pro vero & justo debito*.

2 Cro. 8. 55,
630.
S. C.

But the Court held the Plea good without such an Averment; for it shall be intended the Bond was given for a just Debt, and the Obligation it self shall be sufficient to charge the Executor, tho' he had not received any Money of the Testator's.

Trevelian *versus* Seccomb. Trin. 3 Jac. II.
B. R. Rot. 788.

Plea of ten
Outlawries
in Disability
is double,
because the
Plaintiff is
as well disabled by one Outlawry as by the other Nine.

THE Defendant pleaded ten Outlawries of the Plaintiff on mean Process, in Disability of his Action now brought, and prayed Judgment if any Answer ought to be made whilst those Outlawries are unreversed.

The Plaintiff demurred, for that this Plea was double, and the Cause depended in Court till Michaelmas
5 Term,

Term, Anno 1 Will. when it was argued, that the Plea was not double; for this is in Nature of a Plea in Abatement, in which Sort of Pleas several distinct Matters may be alledged; and therefore Duplicity is not a good Exception to a Plea in Abatement.

Besides there is a Diversity between a Plea in Bar, and in Abatement as to Duplicity in Pleading; for in a Plea in Bar, Duplicity of Matter makes the whole Void; but 'tis not so in a Plea in Abatement, and for this Purpose the Cases in the * Margin were cited.

* 1 Inst. 304.

4 H. 6. 16. a.

But the Court answered there was a Difference between a Plea of an Outlawry in Disability, and other Pleas in Abatement; and that this Plea was ill for Duplicity, because the Plaintiff is disabled as well by one Outlawry, as by all the other Nine, to which several Answers are required, and afterwards Judgment was given, that the Defendant should answer over for Duplicity.

Sanders *versus* Hussey. Trin. 8 Will. in C. B. Rot. 466. but adjudged in Michaelmas Term following.

IN Replevin for taking his Cattle, &c. the Defendant avowed the Taking, for that he tempore quo, &c. seisiens fuit, and was still seised of the Place where, &c. and for that the Cattle were there Damage-tenant, he took them, &c.

2 Lutw.

1231. S. C. where seisiens fuit generally without shewing of what Estate is not good.

The Plaintiff demurred specially, and shewed the Uncertainty of the Avowry, for Cause of Demurrer; for that the Defendant did not set forth of what Estate he was seised either in Fee-simple, Fee-tail, or for Life, &c. but only a general Seisin which is not traversable; and this was adjudged ill, and held for Substance; thereupon the Defendant prayed Leave to amend upon Payment of Costs; to which the Plaintiff consented. Vid. postea Scilly *versus* Dally. S. P.

Langford *versus* Webber. Hill. 2 & 3 Jac. II. B. R. Rot. 965.

IN Trespass for taking and impounding his Horse in the Parish of Brattan Clobelly in Cornwall, sine rationabili causa, &c.

3 Mod. 132. S. C.

In a Justification for a Trespass, the

Defendant pleaded, that T. S. *possionatus fuit* without shewing any Title, nor good.

C

The

The Defendant justified, for that one T. S. tempore quo, &c. legitimè possessionatus fuit; and yet was possessed of and in a certain Close of him the said T. S. called Hayes in Bratton, &c. aforesaid, and for that the said Hoyle eodem tempore, &c. was there Damage-tenant, the Defendant as Servants to the said T. S. and by his command took and impounded the Hoyle as he lawfully might, &c.

And upon a Demurrer to the Plea, it was argued for the Plaintiff, that it was ill; because the Defendant had not made any Title to T. S. of this Close; for 'tis a Rule in Pleading, that in all Justifications for Trespasses, the Defendant in his Bar always makes such a Title to himself to the Lands in which the Trespass is supposed to be done, that it may be traversed by the Plaintiff; and upon which an Issue may be taken, &c. but in this Case the Defendant had only pleaded generally, that W. S. was possessed; and the Possession being not traversable, the Plaintiff cannot make any Answer to it.

Eccontra for
the Defen-
dant.

On the other Side it was argued, that the Bar was good, because the Plaintiff might reply *de injuria sua propria*, or he might confess, and avoid the Possession by Pleading some special Matter, &c. besides in Actions of Trespass, a Man may defend himself merely upon the Possession which is a good Bar to every Man who hath not a better Title; and 'tis generally admitted, that the Plaintiff may maintain an Action of Trespass merely upon his Possession; therefore what Reason can be given, why a Man may maintain an Action on his Possession, and cannot defend himself in an Action brought against him upon such Possession; but Judgment was given, that the Bar was ill.

* Seele *vers.*
Binion.
2 Mod. 70.

* Trin. 27 Car. 2. in C. B. Rot. 1702. the like Justification in Trespass for taking his Cattle; and upon a Demurrer it was adjudged good without shewing any other Title than the Possession, and a Copy of the Record was now produced in Court.

D E

Term. Sanct. Mich.

Anno 3 Jac. II. in B. R. 1687.

Jennings *vers.* Hankyn. Trin. 2 Jac. II. Rot. 121.

DEBT on a Bond against the Defendant as Executor, and in the Margin of the Declaration the County was written thus: Chester, ff. And the Plaintiff declared upon a Bond made by the Defendant's Testator, sealed and delivered apud Tarvin in Com. predict', &c.

2 Lev. 121.
S. C.
1 Vent. 263.
S. C.

Plea to the Jurisdiction must come in Time, for if the De-

fendant pleads in Chief, that Advantage is lost.

The Defendant pleaded plene administravit, and at the Trial the Plaintiff had a Verdict and Judgment.

And now it was moved in Arrest of Judgment, that all the Proceedings were coram non judice, because it appeared upon the Face of the Record, that the Bond was made at a Place within the Jurisdiction of the County Palatine of Chester, so that by the Plaintiff's own shewing, this Court hath no Jurisdiction of this Cause; for local Actions cannot be maintained in any other Places but in the County Palatine where they arise; and tho' this Action is not local in its Nature, yet the Plaintiff having made it so in his Declaration, he hath thereby barred himself to have an Action in this Court.

C 2

Co

Curia.

To which it was answered, and so adjudged by the Court, that the Defendant had lost that Advantage which he might have, if he had not pleaded in Chief, for he ought to have come in Time and pleaded to the Jurisdiction, &c. but now he is foreclosed to say any Thing against it, having admitted the Jurisdiction by pleading in Chief; for this Court is not like any of a limited Jurisdiction, holding Plea of a Cause arising without, for in such Case all is void, as common-law Justice; but 'tis of an universal Jurisdiction and Superintendency, and the County Palatine it self was derived out of the Crown, therefore 'tis subordinate and not at all exempted, and so differs from that Case where the Plaintiff declared on a Bond, and set forth that it was made at Bourdeaux in France, for in such Case this Court never had any Jurisdiction, because the Matter did arise in a foreign Nation.

Besides the Plaintiff declared against the Defendant as in custodia Mareschalli, so that it appears he was out of the County Palatine, and therefore there would be a Failure of Justice if he had no Remedy in this Court.

Nota, That in Trinity Term, 1689, there was the like Case in this Court between Smith *versus* Septon; and the like Exception was taken in Arrest of Judgment, but the Plaintiff had Judgment upon the same Reason, and in that Case this of Jennings was cited, and held to be good Law.

Parkyns *versus* Titus. Mich. 2 Jac. II. Rot. 122.

3 Mod. 132.
S. C.
3 Lev. 255.
S. C.

Custom to
pay so much
for a Fine
for an Ad-
mittance to
a Copyhold,
as the Land

ERROr of a Judgment in C. B. where the Case was thus: In Trespass for entering his Close and treading down his Grass; the Defendant pleaded, that the Place where, &c. is two Acres of Land, which is the Freehold of the Defendant and of the Earl of Essex, and that he (the Defendant) in his own Right, and as Bailiff of the said Earl, justified the Entering, &c.

as the Land is really worth per Acre at the Time of the Admittance, is good.

The Plaintiff replied, that the said two Acres of Land are, and Time out of Mind were, Parcel of the Manor of B. and demised and demisable by Copy of Court-Roll, of which Manor unde, &c. the Defendant and the said Earl are, & eodem tempore quo, &c. were seised in Fee, and that they by their Steward at such a Court held on such a Day,

Day, had granted to the Plaintiff, amongst other Lands, the said two Acres in Fee by Copy of Court-Roll, ad voluntatem Dominorum secundum cons', &c. and that he was admitted, &c. and entered and was possessed, and that the Defendant committed the Trespass with his Cattle, prout, &c.

The Defendant rejoined quod bene & verum est, that the said two Acres are Parcel of the Manor of B. and that they were granted to the Plaintiff in Fee by Copy, prout, &c. but he farther saith, that all the Lands in the said Copy, at the Time of the Grant, were of the yearly Value of 28 l. and that the said Plaintiffs, by their Steward, had set a Fine of 35 l. upon the Admittance of this Defendant; and avers, that the same was a reasonable Fine, and that for Non-payment thereof he entered for a Forfeiture.

The Plaintiff surrejoined Protestando, that the 35 l. was not a reasonable Fine, &c. pro placito he saith, that Time out of Mind there had been a Custom in the said Manor, that any Person or Persons who should be admitted Tenant or Tenants to any customary Lands or Tenements held of the said Manor by Copy of Court-Roll, should pay and have used and ought to pay to the Lord or Lords of the said Manor for the Time being, for a Fine, for the Admittance to such customary Lands and Tenements, tantam denariorum summam quantum terræ vel tenementa valebant per Annum tempore talis admissionis & non amplius, and that the Lands, &c. were of the Value but of 28 l. per Annum, at the Time the Plaintiff was admitted, which 28 l. he tendered to the Defendant himself, being then in Court; but he refused to accept it.

The Defendant demurred, pretending that this was a frivolous Custom, and not good for the Uncertainty, because the Value of the Land is always uncertain, sometimes of a greater and sometimes of a less Value, and so there cannot be any Certainty of the Sum which the Lord is to have for a Fine; but 'tis in the Power of the Tenant to make the Fine of a very low Value by not cultivating the Land.

Then an Objection was made as to the Form of Pleading, (viz.) that the Plaintiff had not assigned any certain Time for the Value of the Lands; he only sets forth, that they were of the Value of 28 l. per Ann. tempore admissionis, which last Words must be applied to the Payment of the Money, and not to the Value of the Land.

But

But the Judgment was affirmed, and this was adjudged a good and reasonable Custom; and a Judgment was cited in Point in the Lord Ch. Just. Hale's Common-Place Book, in the Library at Lincolns-Inn, Ctt. Copyhold, and the Form of Pleading was likewise held good.

Jefferies *versus* Snow. Trin. 3 Jac. II. Rot. 675.

Trespass against Will. Snow, Bart. who pleaded in Abatement, that he was a Knight and Baronet, and good.

TRespass against the Defendant by the Name of William Snow, Baronet, who pleaded in Abatement, that at the Time of the Bill purchased, he was and yet is a Knight and Baronet; and because he is not called Knight as well as Baronet, he prayed Judgment, &c.

And upon a Demurrer to this Plea, the Court seeming to be of Opinion that it was good; the Plaintiff prayed Leave to amend, and had it.

Hull's Case.

Whether Quit-Rents ought to be taxed to the Poor.

MR. Hull, a Gentleman at the Bar, being chosen Overseer of the Poor of the Parish of Stoke Nayland in Suffolk, made a Rate, in which he charged the Quit-Rent of several Manors within the Parish, in Proportion to the yearly Value thereof, which Rate was tendered to two Justices of the Peace to sign, but they refused because the Quit-Rents ought not to be taxed; whereupon the Overseer, upon Application to this Court, obtained a Rule to enforce the Justices to sign it, which was strongly opposed, because no Instance could be given that ever the Quit-Rents were charged, but the Court ordered the Rate to be signed, and a Warrant to distrain; so that if any Person thought himself aggrieved, he might replevy, and the Matter in Law brought in Question.

The King *versus* Darby.

Information for defamatory Words spoken of a Justice of Peace.

AN Information was exhibited against the Defendant Darby, an Attorney of the Common Pleas, for speaking scandalous and reproachful Words of Sir John Key, Knight of the Shire for the County of York, and a Justice of Peace, &c. concerning his said Office of a Justice of the Peace, and the Exercising thereof.

And upon a Demurrer to this Information, it was argued, that it would not lie for scandalous Words spoken only of a particular Person; because he might have an Action on the Case to recompence him in Damages; 'tis true such a Proceeding might be warranted for Libels, or for dispersing Defamatory Letters, because by such Means the publick Peace might be disturbed, and Discords sown amongst Neighbours which might at last be a publick Injury; but there is no such Thing alledged in this Case, only Words in common Discourse, for which an Action on the Case might lie, but no Information.

On the other Side, it was insisted, that this Information was founded on sufficient Matter; because this Prosecution is not only as it respects the Person of Sir John Key; but it relates to him as he is a publick Magistrate, and one who is subordinate to the Government; and therefore such Defamatory Words are a Reproach to the Supreme Governour by whom Magistrates are intrusted; and from whom they derive their Authority; and it will not be denied, but that Words reflecting on the publick Government, are punishable at the Suit of the King by an Information.

Econtra.

4 Rep. 13.

5 Rep. 125.

3 Inst. 174.

Palm. 454.

And for this Reason the Court held, that an Information would lie; and thereupon gave Judgment against the Defendant, and fined him an hundred Marks.

Cafe in Chancery.

THE Mother having two Daughters A. and B. made her Will, and thereby devised 200 l. to her Daughter B. to be laid out (by her Trustees in the Will named) in Lands, and to be settled to the Use of the said B. and the Heirs of her Body; and if she died without Issue, then to the Use of the Children of A. (who then had Issue the Plaintiff, and the Mother of the Defendant;) but before the Money was laid out in a Purchase, B. died without Issue; and then the Trustees laid out the 200 l. in a Purchase of Lands, and settled the same on the Plaintiff, and on the Mother of the Defendant jointly in Fee according to the Will, (they being the Children of A.) and they jointly enjoyed the same for some Time; and then the Mother of the Defendant died before any Severance was made of this joint Estate.

Jointchanta,
i.e. the Survivor shall have the Whole, after the Death of the other before Severance.

And

And now the Question was, whether the Defendant should have her Mother's Polety, or whether the Plaintiff should have the whole by Survivorship; and it was decreed, that the Plaintiff should have the Whole.

Where the
Survivor
shall have no
Benefit.

And here the following Case was put, (viz.) 500 l. a piece is devised to two Legatees; and afterwards they took a Mortgage jointly to both of them, for securing the Payment of their Legacies with Interest; and there one of them died; it was held, that the other shall have nothing by Survivorship, because in this Case the Mortgagees were Trustees for each other; and the Mortgage which is only as a Security makes no Alteration in the Case.

And in the Principal Case it was held, that if the Money had not been actually laid out in a Purchase, the Defendant would have been entitled to a Polety thereof; for in such Case there should be no Survivorship. Quod nota.

Goring *versus* Deering.

3 Mod. 156.
S. C.
Where the
Defendant
was indicted
for Murder,
and found
guilty of
Manslaughter,
and demanded the
Book, tho' he did not
read, this is
a good Bar
to an Appeal.

In an Appeal of Murder, the Defendant pleaded a special Bar, (viz.) that at another Time he was indicted for the Murder of the same Person in the Appeal mentioned; and that at a Sessions held on such a Day, and in such a Year at the Old Bailey in London, for the County of Middlesex, he was arraigned and tried for the said Murder, and found Not guilty, but guilty of Manslaughter, and averred, that he is the same Person, and the same Crime; and that he is a Clerk, and able to read, and was able so to do at the Time of the Verdict found, and that he then demanded the Book, and that he was always ready to read, when it should be required of him; & hoc, &c.

* 3 H. 7. c. 1.

And upon a Demurrer to this Plea, it was argued, that it was not good, and no Bar to the Appeal; because by the * Statute 'tis enacted, that the Acquittal of the Party, &c. and the Benefit of the Clergy not being had, &c. shall be no Bar to the Prosecution of an Appeal by the Wife or next Heir, within a Year and a Day, &c.

So that by this Statute the Common Law is altered, for now Autrefoits acquit or convict is no good Plea to an Appeal of Murder, unless the Clergy be first had; but 'tis otherwise in an Appeal of Rape or Robbery, because the Statute doth not mention those Crimes.

Now in this Case, the Defendant hath not pleaded, that he had his Clergy allowed, or that he performed it; and therefore his Plea is ill, and it shall never be in the Power of a Clerk convicted to demand his Clergy when he will; but he ought to stay till the Court demands of him what he hath to say for himself why Judgment, &c. shall not be given against him; and then, and not before is the proper Time for him to pray his Clergy to be allowed, and the Demanding the Benefit thereof before that Time, or to alledge that he is ready to read, signifies nothing.

Staundf. 106,
206.
And. 68.
3 Inst. 131.
Hob. 288.
W. Jones 284.

But it was argued on the other Side, that the Defendant having a Right to the Benefit of his Clergy, 'tis the same Thing in Effect as if he had actually performed it; and the Court is not to * delay the Clerk from this Benefit; and the Entry of the Demand of the Court what the Prisoner hath to say for himself, &c. is merely Form; therefore the Clerk being always ready to read; but the Book not being tendered to him, 'tis a Remittance to his Privilege without an actual Reading.

Econtra.

* Holcroft's
Case.
4 Rep. 46.
Co. Ent. 55,
54 S. C.

Then an Objection was made to this Appeal for the Uncertainty thereof; because the Fact was alledged to be Circa the eleventh Hour; whereas the Statute of * Gloucester is peremptory, that the very Hour shall be named; sed non allocatur; for all the Precedents are in this Form.

* Cap. 11.
Anno 9.
Ed. 1.

Another Objection was, that here was no Venue laid; for by the same Statute of Gloucester 'tis enacted, that the Town where the Fact was done shall be expressed; and here it was alledged to be apud parochiam de M. &c. but a Parish is not a Town or Vill, for it may contain one or more Villages; and this Statute is to be construed literally, because it was made in Favour of Life. Adjournatur. See the Case next following.

Staundf. 80.
1 Leon. 170.

Penrose *versus* Welch and Power.

THIS was likewise an Appeal of Murder, and the Defendant pleaded as above, only he omitted, That he demanded the Book to perform his Clergy; but they pleaded, that they were Clerks, and then and still are ready to read.

Where the
Court cannot
delay the
granting the
Benefit of
Clergy.

D

And

And now the like Exception was made to this Plea as in Deering's Case, and moreover, that before the Statute 3 H. 7. after a Conviction of Manslaughter upon an Indictment, the Court might very well delay the Allowance of the Clergy for a Year and a Day, until the Appeal might be tried.

'Tis true if the Court demands of the Party what he hath to say, &c. and then he prayeth the Benefit of his Clergy, in such Case the Court cannot delay it, by a *Coria advisare vult*; but if he demands the Benefit of his Clergy himself, before he is asked by the Court what he hath to say, &c. there he may be delayed.

Econtra.

The Counsel for the Defendant made the like Answer as in the Case above; and moreover that at Common Law Antefoits convict of Manslaughter was a good Plea, in Bar to an Appeal, but by the Statute 3 H. 7. the Law was altered as to that Point; for now Antefoits convict of Manslaughter is no good Plea, unless Clergy had been allowed; so that the only Point in this Case depends upon the Construction of the Words in that Statute; and that is whether the Court hath Power to delay the Granting the Benefit of the Clergy; and it was insisted that they had not; but that if the Party convicted is a Clerk, and ready to read, the Benefit of Clergy must accrew to him without doing more; and to prove this Matter the Statute 25 Ed. 3. c. 5. was cited by which 'tis enacted, That a Clerk shall be arraigned of all his Offences at once; and Holcroft's Case was cited to prove, that at Common Law the Court had not Power to delay the Party when he demanded the Benefit of his Clergy, which before the Statute of H. 8. was allowable even upon a Conviction of Murder or Felony.

'Tis true if the Confession of the Offence appears on Record, there Clergy was not allowed at Common Law; and the Reason of Purgation by Clergy, is because the Party may be innocent notwithstanding the Verdict; but he cannot be so where he confessed the Offence.

Rodney *versus* Strode & al'. 1 & 2 Jac. II.

UPON a Verdict against the Defendants at Dorchester 3 Mod. 101.
Lent-Assises, Judgment was given in Michaelmas- S. C.
Term following.

The Case was: In Trespass and False Imprisonment and Imposing the Crime of Treason on the Plaintiff, &c. this Action was brought against the Defendant Mr. Strode of Lincoln's-Inn, and against Pemberton his Clerk, and against another who confessed the Action; but the Defendant Strode, and his Clerk, pleaded jointly Not guilty, and the Jury found them guilty jointly, and assessed the Damages severally, (viz.) as to Strode 1000 l. and as to his Clerk 50 l. and likewise 50 l. as to him who confessed the Action; and then the Plaintiff entered a Nolle prosequi as to the Clerk, and to the other who confessed the Action, and took his Judgment only against Strode for 1000 l. who now moved in Arrest of Judgment: And the Question was, if the Entry of this Nolle prosequi had cured the Fault in the Verdict as to the Assessing the Damages severally, or whether a Nolle prosequi against those two Defendants before Judgment was in Nature of a Release, and so a Discharge to all.

And it was argued for the Defendant, that a Nolle prosequi before Judgment is a Release of all, and * Hob. f. 70. was cited as an Authority in Point: Which was Trespass against Three; one of them pleaded Not guilty, and the other Two justified; the Plaintiff replied, and the Defendant demurred to the Replication; but before any Judgment was given on the Demurrer, the Issue was tried and found against him who pleaded Not guilty, and thereupon Judgment was had against him; and then the Plaintiff entered a Nolle prosequi as to the Two who had justified; and they all brought a Writ of Error in the Exchequer Chamber, and assigned for Error, that the Nolle prosequi was a Discharge to them all, which is very true, if it had been before Judgment, and admitted to be so by the Counsel for the Plaintiff; but here Judgment was given against him who pleaded Not guilty, therefore there was an End of the Action as to him; and there being no Judgment against the other Two, therefore they were not discharged by the Nolle prosequi.

Trespass against Three, the Jury found them all jointly guilty but severed the Damages, then the Plaintiff entered a Nolle prosequi as to Two of the Defendants; this cured the Fault in the Verdict.

* Parker *ver.* Lawrence. Cro. Car. 173, 239. Walsh *ver.* Bishop. S. P. 1 Roll. Rep. 233. S. C. See 2 Roll. Abr. 134. the Case of Lawrence and Parker reported otherwise than in Hob.

4 Rep. 56.
Heydon's
Case.

But this Verdict is vicious in it self, and therefore can never charge the Defendant Sirode, and cannot be cured by the Entry of a Nolle prosequi, or by a Release of the Damages; now this Verdict is ill, because where the Defendants are charged with a joint Trespas, and the Jury find them all guilty at the same Time, they ought not to sever the Damages.

As to the Case of Walsh *versus* Bishop, 'tis not like the present Case, because there the Defendants severed in their Plea, and so they did in the Case of Lawrence *versus* Parker; for one pleaded the general Issue, and the other justified; and 'tis so in all Cases where a Remittitur is entered as to one, and Judgment taken against another joint Trespasser; their Pleas are always several, and not joint, as in this Case they are.

But notwithstanding the Plaintiff had Judgment, and thereupon a Writ of Error was brought; and it was argued for the Plaintiff in Error, that this Verdict was void and repugnant, because the Jury found the Defendants guilty de præmissis, (i. e.) equally guilty, and afterwards they severed the Damages, by Reason whereof one was made more guilty than the other; and it was laid down for a Rule in Law, that what the Plaintiff had laid joint in his Declaration, the Jury could not sever in their Verdict; and the Case of Whorewood *versus* Jackson was now cited, which was lately adjudged in the C. B. it was Trover against two Defendants, who pleaded jointly Not guilty, and the Jury found them guilty de præmissis, and afterwards severed the Damages; and this was held an ill Verdict, tho' 'tis contrary to Cro. Car. 54. where it was held, that upon such a joint Plea in Trover, the Jury might find one guilty of Part to such a Value, and another to such a Value, and sever the Damages.

Contra to
support the
Verdict.

* Rast. Ent.
127. a. 583,
634.
Roll. Abr.
784.

On the other Side it was argued, that the Defect of this Verdict was cured by the Nolle prosequi, and 'tis very reasonable it should be so, because the Plaintiff might bring his Action against the Defendant jointly or severally; therefore after * Verdict he ought to have the like Election as to the Damages.

Now this Verdict having found the Defendants guilty, and Damages assessed to 1000 l. those Damages shall be applied to all the Defendants, and therefore the finding Damages over as to 50 l. is Surplusage, and shall not hurt the Verdict.

Cro. Car. 192.

* In Pilford's Case, the Plaintiff declared in Trespass ^{10 Rep. 115.} to his Damage of 40 l. and at the Trial the Jury assessed Damages to 49 l. and 20 s. Costs, and at the Day in Bank he released 9 l. Part of the Damages, and had Judgment for 40 l. and 10 l. Costs de incremento; and this was held good; so that a Verdict which is quashable may be made good by Matter ex post facto.

Now several Cases were cited to prove, that a Nolle prosequi as to one before Judgment, is no Discharge to the rest; all which may be seen in the Margin.

15 Ed. 4. 26. 11 H. 7. 6. Co. Ent. 287, 650. 1 Roll. Rep. 395. 2 Roll. Abr. 104. Style 299.

And the Case of Trebarefoot *versus* Greenway, late adjudged in B. R. and affirmed in Error, is a Case in Point, which was thus, (viz.) Trespass and False Imprisonment was brought against three Defendants; two of them pleaded Not guilty, the other justified, &c. and upon the Trial the Jury found them all guilty jointly, and assessed Damages severally, (viz.) 20 l. as to him who justified, and 200 l. as to the other Two who pleaded Not guilty; and the Plaintiff entered a Nolle prosequi as to him who justified, and took Judgment against the other Two for 200 l. and the same Objection was made in that Case as now; but notwithstanding the Plaintiff had Judgment in B. R. which was affirmed in Error, for it was held that the Entry of the Nolle prosequi had cured the Defect of that Verdict.

And thereupon the Plaintiff in the principal Case had Judgment in B. R. which was likewise affirmed in Error in the Exchequer Chamber; and afterwards in Easter Term 1 Willi', Mr. Strode brought a Writ of Error in Parliament, where the Judgment was likewise affirmed.

DE

D E

Term. Sanct. Hill.

Anno 3 & 4 Jac. II. B. R.

Herring *versus* Brown.

*J. L. Hill. 85. 82. 71. 104.
L. Hill. 360. 371. 2. Hill.
105. 106. 11.*

1 Vent. 371.
S. C.

Where the
Levying a
Fine shall de-
stroy the
Power of Re-
vocation.

ERROR in the Exchequer-Chamber to reverse a Judgment given in B. R.
II. In a special Verdict in Ejectment, the Case was, Sir John Williams being seised in Fee of the Lands now in Question, made a voluntary Settlement thereof, (viz.) to A. and B. and their Heirs, to the Use of himself for Life, Remainder in Tail to his Brother Sir Maurice Williams, with a Power of Revocation, &c.

Afterwards in Trinity-Term, &c. Sir John levied a Fine, and by a Deed made between him and the said Sir Maurice and others, bearing Date a Month after the said Term, it was declared, that whereas a Fine was levied, &c. and that at the Time of the Levying thereof, it was consented and agreed unto by all the Parties to the said Deed, that the said Fine should be to the Use of the said Sir John and his Heirs.

And now the principal Objection was, that Sir John Williams, by Levying this Fine, without any Declaration of the Uses precedent to the Levying it, had extinguished his Power of Revocation, and forfeited his Estate for Life, for that the Deed subsequent to the Fine was ineffectual, because there was an intermediate Time between the perfecting the Fine and the Date of the Deed, in which the

Forfeiture did attach, and the Power was extinguished; and if so, then no subsequent Act could purge the Forfeiture which was once attached, nor revive the Power which was extinguished; and for these Reasons, and upon the Authority of * Digg's Case, and † Albany's Case, it was adjudged in B. R. that by levying the Fine, Sir John had extinguished this Power of Revocation; and that the subsequent Declaration of the Uses was of no Effect.

But this Judgment was reversed by six Judges against two, for the Reasons following, (viz.) That all Deeds ought to be construed according to the Intention of the Parties; and that in the present Case the Intention of Sir John Williams, and the Parties to the Deed, plainly appeared by this subsequent Declaration of the Uses of this Fine.

Deeds ought to be governed by the Intention of Parties.

That the said Sir John had something more than a naked Authority, for he had an Authority vested with Interest; and therefore 'tis not within the common Case of a meer Authority, which is always to be strictly taken.

That Powers of Revocation ought to be favourably construed, and very largely for the Benefit of the Parties; and in this Case Sir John Williams was more than an ordinary Tenant for Life; for if an Estate is granted to one for Life, who afterwards levies a Fine *sur cognissance de droit*, and declares the Uses to himself for Life, Remainder to the Grantor or Lessor, this is a Forfeiture; because he had only a particular Estate by the Grant of another Person; and therefore is not to be favoured in any Act which he doth to disinherit such Person.

But in the principal Case, the Estate first moved from Sir John Williams, and the Conveyance was Voluntary; and therefore it would be very hard to expound Things so as he who once had the sole Interest of the Estate, should

* This was a Covenant to stand seised with a Power of Revocation by Deed to be enrolled; afterwards by Deed dated 20 Sept. 13 Eliz. and enrolled in Michaelmas-Term following, Digg's revoked the first Deed, and declared new Uses; and in the same Term he levied a Fine, &c. adjudged that the Fine levied before the Enrollment, which was before the Revocation, had extinguished that Power.

Digg's Case.

† Feoffment of two Acres to the Use of A. for Life; Remainder to C. in Tail; Remainder to D. in Fee, Proviso if E. should die without Issue, that then A. in the Presence of four Witnesses might revoke, &c. and declare new Uses; A. made a Feoffment of one of the Acres to E. and afterwards in the Presence of four Witnesses, revoked the first Uses, and limited new Uses; adjudged that by the Feoffment the Power to revoke and to limit new Uses, was extinguished.

Albany's Case.

by this voluntary Settlement extinguish all the Right he had to it.

2 Rep. 74,
75.
2 Roll.
Abr. 394.
2 Cro. 312.

Besides the Fine and the subsequent Deed declaring the Uses thereof, are but one and the same Conveyance, and both together are an Execution, and not an Extinguishment of the Power; for it is agreed, that a Fine alone without a Deed, declaring the Uses, had extinguished it; but 'tis not so where there is a Deed to declare the Intention of the Parties at the Time of the levying thereof; and tho' the Date of this Deed is subsequent to the Fine, for no other Reason, but because the Fine ought to relate to the precedent Term, tho' in Truth it might be levied in the Vacation, and so the Deed might be executed at the same Time the Fine was acknowledged; therefore it would be unreasonable to make a Forfeiture or Extinguishment of a Right merely by Relation, which is but *factio juris*.

But Justice Lutwich was clear in Opinion, that the Power of Revocation was extinguished by this Fine, and he put these two Cases, (*viz.*) If a Power of Revocation is annexed to an Estate for Life, and that Estate determines before the Power is executed, by that Means the Power is extinguished.

That when ever a Fine *sur cognisance de droit* is levied, *aliquid operatur immediate*, and an Estate passes from one to another *indilate* upon the perfecting thereof; therefore in the principal Case immediately upon levying the Fine, an Estate in Fee passed to the Cognisor; and the particular Estate for Life was determined; so that 'tis an Extinguishment, or a Forfeiture, which no subsequent Act can purge; but that the Defendant who claims as Heir to Sir Maurice Williams was estopped by the Deed found by the Jury, and by the Fine, to say, that it is a Forfeiture, because his Ancestor Sir Maurice Williams was one of the Cognisees; and the Jury found that the subsequent Deed was made between the said Sir John Williams, and Sir Maurice, and others, reciting that it was agreed by all Parties thereunto at the Time of the Fine levied, that it should be to those of Sir John in Fee; and for that Reason he was of Opinion that the Judgment ought to be reversed.

2 Lev. 149.
S. C.
Raym. 239.
S. C.
1 Vent. 279.
S. C.

And in this Case was cited the Case of *Wigson versus Garret*, when Hale was Chief Justice, which was thus:

A Man made a voluntary Settlement with a Power of Revocation, so as it was in Writing attested by three Witnesses; afterwards by Indenture attested as aforesaid, he covenanted to levy a Fine which was levied accordingly; and this was adjudged a good Revocation, and pursuant to his Power; so though the Indenture alone would not make it so, because the Uses referred to a Thing to come, and the Fine alone was rather an Extinguishment, than a Revocation, yet both together were sufficient to revoke it; so, as the Chief Justice said, *Juncta juvant*.

D E

Term. Paschæ.

I Will. & Mariæ B. R.

From this Term all the Cases reported here were adjudged when Sir John Holt was Chief Justice of the King's Bench.

Andrews *versus* Sir Robert Clerke.

ANDREWS levied a Plaint in the Sheriffs Courts in London, and upon the usual Suggestion, that one T. S. (the Garnishee) was Debtor to the Defendant, a foreign Attachment was awarded to attach that Debt in the Hands of T. S. which was accordingly done; and then a Dilectur was entered, which is in Nature of an Imparlane in that Court.

Upon a Foreign Attachment, the Garnishee pleaded to the Jurisdiction of the Sheriff's Court; but it was over ruled.

E

After

Afterwards T. S. (the Garnishee) pleaded to the Jurisdiction, setting forth that the Cause of Debt due from him to the Defendant Sir Robert Clerke, and the Contract on which it was founded, did arise, and was made at H. in the County of Middlesex, extra jurisdictionem Curiae; and this Plea being over-ruled; it was now moved (in behalf of T. S. the Garnishee) for a Prohibition to the Sheriffs Court aforesaid, suggesting the said Matter, (viz.) that the Cause of Action did arise extra jurisdictionem, &c. but the Prohibition was denied; because the Debt always follows the Person of the Debtor; and 'tis not material where it was contracted, especially as to this Purpose of foreign Attachments; for it was always the Custom in London to attach Debts upon Bills of Exchange, and Goldsmith's Notes, &c. if the Goldsmith who gave the Note, or the Person to whom the Bill is directed, liveth within the City, without any respect had to the Place where the Debt was contracted.

In this Case it was held clearly, that admitting the Plea thus pleaded by the Garnishee to the Jurisdiction of the Sheriffs Court was good in Matter; yet it ought not to be allowed in this Case, because it came too late, (viz.) after a Dilectur entered; for Pleas to the Jurisdiction must always be pleaded primo die.

And it was agreed by all, that a foreign Attachment in London, is to no other Purpose, but to compel an Appearance of the Defendant in the Action; for if he appear within a Year and a Day, and put in Bail to the Action, the Garnishee is discharged, but without Bail they will not accept an Appearance.

Knight *versus* Berry.

Proceedings
in the Ad-
miralty,
where the
greater Part
of the Ow-
ners are opposed by the Lessor in the Ship's going a Voyage.

Prohibition to the Court of Admiralty, suggesting that they held Plea between the Parties for Matter arising upon the Land, and so out of their Jurisdiction: The Case was thus:

A There were several Part-owners of a Ship, and the major Part of them agreed to send her in a Voyage to Sea, but the rest disagreed; whereupon the greater Number (according to the common Usage in such Cases) suggest in the Admiralty-Court the Disagreement of their Part.

Partners, and then (according to their Usage there) they order certain Persons to appraise the Ship, who accordingly set a Value thereon; and then the major Part who agreed to the Voyage, enter into a Recognizance, wherein they bind themselves jointly and severally to the disagreeing Partners, in a Sum proportionable to their Shares, according to the Value set by the Appraisers, &c. which is usually done in that Court, to secure the Shares in the Ship of those who disagree to the Voyage against all Adventures.

Afterwards Berry, one of the disagreeing Partners, Hardres 473. takes out a Sci. fa. upon such a Recognizance entered into by Knight, and Sentence was had against him in the Admiralty Court, from which he appealed to the King in Chancery, and a Commission of Delegates was actually taken out.

And Knight now moved for a Prohibition, for that since that Court had no Jurisdiction in this Case, all was done coram non iudice.

It was argued for Berry, that this Course had been allowed and practised in that Court for several Years, in all Cases, where the lesser Number of Partners dissent to a Voyage proposed by the major Part, and that the Legality of such Proceeding was never yet doubted, and great Inconvenience would ensue to Traders, if there was no Means for the major Part of the Owners to redress themselves as to their own Shares, against the Obstinacy of a lesser Number disagreeing; for by that Means the Ship would lie idle, and be of no Use, when she should be in a Voyage for the Benefit of Trade.

But the whole Court was of Opinion, that the Admiralty Curia. had no Conscience of this Matter, and therefore all that was done, was coram non iudice, and thereupon a Prohibition was granted.

And the Chief Justice Holt held clearly, that the major Number of Partners were not without a proper Remedy at Law, for that an Action against the lesser Number might be framed upon the Special Matter, setting forth, that quod cum by the Law and Custom of this Realm, if several Partners be of a Ship, and the major Part agree to send her on a certain Voyage, &c. and the lesser Number dissent, &c. that the Agreement of the greater Number shall bind the rest, and so bring the particular Case within this Custom, by shewing the Partnership and the Agreement of the Plaintiffs (the greater Number) and the Disagreement of

the Defendants, the lesser Number, &c. per quod the Profits of the Voyage were lost, ad damnum, &c.

The King *versus* The Parish of St. Peter in Malden, and the Parish of Hebridge in Essex.

Assessing a poor Man to the Parish-Rates, amounts to Notice in Writing.

II. **T**HE Case, (viz.) one Paine and his Family, who dwelt in the Parish of Hebridge, came from thence into the Parish of St. Peter in Malden, where he rented an house of 3 l. per Annum, and was proportionably assessed by the Parish-Officers to their Parish-Rates of Church and Poor, which he duly paid; and having lived there one Year and an half, he died, leaving a Poor and indigent Family.

The Justices of Peace, at their Quarter-Sessions, rectifying the whole Matter specially in their Order, (on Purpose to bring it fairly to Judgment) and that no Notice was given in Writing by the said Paine to the Parish-Officers, according to the Letter of the Statute; they ordered, that the Family should continue at St. Peter's Parish, and that the Officers should allow them so much for their Maintenance.

This Order was removed into B. R. by Certiorari, and it was now moved to quash it, because Notice in Writing ought to be given pursuant to the Statute, &c. otherwise this Man could not be settled in the Parish of St. Peter; and by the Order it self it appears, that no such Notice was given.

Curia.

But the Court confirmed the Order, for that the Parish-Officers had Notice sufficient within the Intent of the Statute, tho' not within the Letter, because the Assessing this Man to the Parish-Rates, and receiving the Money assessed is a sufficient Evidence, that they knew he was an Inhabitant there, and the Meaning of the Statute is no other.

Gerard *versus* Danby.

Where Judgment is had upon a Bond conditioned for Payment of Money only, a Writ of Error is

ERROR of a Judgment in C. B. in an Action of Debt on a Bond, with a Condition to perform Covenants in an Indenture, and amongst the rest one was for Payment of Money, and the other were collateral; and the Breach assigned was, for not paying the Money.

no *Superfedeas*, unless the Plaintiff in Error put in Bail.

The Defendant pleaded the Statute of Usury; and now it was moved, that the Plaintiff in Error might put in Bail according to the Statute * 3 Jac. by which 'tis enacted, that a Writ of Error shall be no *Superfedeas* to a Judgment given upon a Bond, with a Condition for Payment of Money only, &c. unless the Plaintiff in the Writ of Error put in Bail, &c. in double the Sum, &c. to prosecute the Writ with Effect. * 3 Jac. c. 8.

But per Holt Chief Justice, This Case is not within the Statute, for that relates to Judgments given upon Bonds, with a Condition for Payment of Money only; but the Condition in the present Case is not only for Payment of Money, but to do collateral Acts; 'tis true, the Breach assigned is for Non-payment of Money; and therefore the Case upon the Pleading is the same as if the Condition of the Bond had been for Payment of Money only; but yet this Writ of Error was allowed without Bail.

See 1 Lev.
117.

Pepys versus Low. Mich. 4 Jac. B. R. Rot. 540.
but adjudged in Easter-Term, 1 Willi'.

THE Plaintiff as Assignee of the Commissioners of Bankruptcy of T. S. a Trader brought a special Assumpsit against Lowe, one of the Debtors of the said T. S. in which he declared, that the said T. S. was a Trader, and indebted to the Plaintiff, and that the Defendant was indebted to T. S. for Goods sold and delivered, and that afterwards, (viz.) on such a Day in such a Year, the said T. S. manifeste devenit decoctor (Anglice, a Bankrupt) *infra intentionem separal. statut. in hujusmodi casu edit. & provil. vel un. eorum.* then he sets forth a Commission of Bankruptcy directed to such Persons, &c. and that the Commissioners had by Indenture, &c. assigned this particular Debt to the Plaintiff, and that in Consideration of the Premises the Defendant promised to pay, &c. but had not done it, by Reason whereof the Plaintiff was damaged.

In a special Action on the Case brought by the Plaintiff as Assignee of the Commissioners of Bankruptcy, he need not shew how the Person became Bankrupt.

Upon a Demurrer to this Declaration it was objected, that it was ill and incertain, because the Plaintiff had not shewed how T. S. became a Bankrupt, (viz.) either by keeping close within his House, by suffering himself to be arrested, or by some other Marks or Circumstances described in the * Statute of Bankruptcy: And this was compared to the Cases of Simony, in which the Person who pleads Simony in another, ought always to shew in certain how,

* 13 Eliz.
cep. 7.

how, and in what Manner he is guilty of Simony, and not generally, that he is simoniacus.

Curia.

* 31 Eliz.
cap. 6.

But it was adjudged, that a Declaration in this general Form was good and certain enough, and that there was a Difference between Cases upon the Statutes of Bankruptcy, and Cases upon the Statute against Simony; for in the Statutes of Bankruptcy, the Word Bankrupt is mentioned, (viz.) he who is a Trader and doth so and so shall be a Bankrupt, but in the Statute against Simony that Word is not mentioned, for 'tis only said, that the Person corruptly taking any Benefice, &c. shall be adjudged a Person disabled in the Law to have or enjoy such Benefice; besides, the Plaintiff in this Action is altogether a Stranger to the Bankrupt, and therefore it doth not lie within his Knowledge how, or in what Manner he became a Bankrupt.

Judgment for the Plaintiff.

Obrian *versus* Ramm. Mich. 3 Jac. II. B. R.
Rot. 192. Judgment in Easter-Term, 1 Willi'.

3 Mod. 186.
S. C.

ERROR of a Judgment given in the Court of Common Pleas in Ireland, and affirmed in B. R. there the Case was:

Judgment against a Feme sole, who afterwards married, and then the Plaintiff brought a Sci. fa. against Husband and Wife, and had Judgment against them, to have Execution, and then the Wife died, the Husband shall be liable.

A Judgment in Debt was obtained by Ramm against a Feme sole, who afterwards married the Plaintiff Sir Donald Obrian, and then Ramm brought a Sci. fa. on that Judgment in B. C. in Ireland, against Husband and Wife, to have Execution thereof; and after two Nihilis returned, Judgment was had against them to have Execution, and a Year and a Day expired before any Execution was executed, and then the Wife died; and afterwards Ramm brought another Sci. fa. against the Husband alone, to have Execution of the said Judgment.

The Defendant Obrian, (the Husband) pleaded a frivolous Plea, to which the Plaintiff demurred, and Judgment was given for Ramm in C. B. in Ireland, which was affirmed in B. R. there; and now a Writ of Error was brought in the Court of the King's Bench here, and the Error assigned was Matter in Law, (viz.) that Obrian (the Husband) was not liable to an Execution upon this Judgment after the Death of his Wife, because he was chargeable merely upon her Account, and in Respect to her only during the Time of the Coverture; and the Judgment on the Sci. fa.

sa. to have Execution against Husband and Wife doth not alter the Case; for that Judgment amounts to nothing more than a Liberty to take out Execution after the Year and the Day expired, which Liberty is given by the Statute; for at Common Law after the Year and a Day expired, no Execution could be had but only an Action of Debt on the Judgment; and the Reversal of the first Judgment is likewise a Reversal of the Judgment in the Scire facias; and therefore such Judgment will not bind the Husband in any other manner than he was bound before, (i. e.) during the Coverture.

But the Court was of another Opinion, (viz.) that the Judgment on the Scire facias against Husband and Wife, had altered the Case, and made the Husband liable.

Moor 299.
3 Cro. 216.
F. N. B.
122. a.

So the Judgment was affirmed.

Beak *versus* Tyrrell.

IN Trover for a Ship, &c. the Defendant pleaded specially, that he was the King's Servant, and Captain, and Governor of such a Man of War, (but did not set forth any Commission) and that he seized the Ship mentioned in the Declaration as a Prize, (but did not set forth any Cause of Forfeiture by which she became a Prize) and that he carried the Ship to the Port of Sally in the East-Indies; and pleaded generally, that the Admiralty Court there gave Sentence against the Ship as Prize, & hoc, &c. unde, &c. and upon a Demurrer to this Plea, the Exceptions following were taken.

See 1. Show. 6.

3 Mod. 194.
S. C.

Trover for a Ship; the Defendant pleaded, that he took her as a Prize, and that by a Sentence in the Admiralty, she was condemned, &c.

(1.) The Defendant had pleaded, that he was an Officer to the King, but did not set forth any Letters Patent, or Commission under Seal; and a Man cannot have such an Authority without a Commission.

*See 2. L. Raym.
891.*

To which it was answered and resolved, that 'tis not necessary, that every Captain of a Man of War should be constituted by a Commission under Seal; because the King may give him that Authority by a Warrant subscribed only; besides this is a Matter traversable, and therefore the Plaintiff might have traversed the Truth of this Fact if he would; but now 'tis admitted to be true by the Demurrer.

(2.) The second Objection was, that the Defendant did not set forth in his Plea any Cause of Forfeiture by which this

this Ship (being a Ship of the Subjects) might become a Prize; for according to common Intendment, the Goods of one Subject cannot be a Prize to another Subject; because a Prize is properly something taken on the High Sea from a common Enemy against whom War is declared; and the Goods of a Natural-born Subject cannot be Prize without some special Cause alledged.

(3.) The third Exception was, that the Defendant had not set forth for what the Sentence was given, or who was the Judge of the Court of Admiralty, who gave Sentence, and to whom such Court did belong; for he did not shew that it was the King's Court, or the Court of any other foreign Prince, so that the Plea is altogether incertain.

To both which last Exceptions it was answered, and so resolved, that it was necessary for the Defendant to shew some special Cause for which the Ship became a Prize; and that he ought to shew who was the Judge that gave Sentence, and to whom that Court of Admiralty did belong; and for these Faults the Plea was adjudged insufficient.

And in the Argument of this Case, the Court cited a Case which happened in the Wars between the French and the Dutch.

The Court
of B. R. will
give Credit
to a Sen-
tence given
in the Court
of Admir-
ty in France.

*See L. C. cited in
Book in 2nd Term.
1783.*

¶ An English Ship was taken by a French Man of War under Colour of a Dutchman, and carried into France, and there condemned by their Court of Admiralty as a Dutch Prize; afterwards an English Merchant bought this Ship of the French-Men, and brought her into England, where the right Owner brought an Action of Trover for the Ship against the Purchaser; and all this Matter being found specially, the Defendant had Judgment; because the Ship being legally condemned as Dutch Prize, this Court will give Credit to the Sentence of the Court of Admiralty in France; and take it to be according to Right, and will not examine their Proceedings; for it would be very inconvenient if one Kingdom should by peculiar Laws correct the Judgments and Proceedings of the Courts of another Kingdom.

Vanacre *versus* Spleen, in B. R.

UPON a Motion for Prohibition in the Case of one Tiler *versus* Mantell, Justice Dolben cited the Case of Vanacre as followeth:

Libel against the Defendant for not repairing Part of the

Church-Wall, which by Custom he was bound to do; a Prohibition was granted after Sentence, because a Custom is not triable in that Court.

H. Spleen the Church-warden of D. libelled in the Spiritual Court against Vanacre for not repairing Part of the Church-Wall, wherein he set forth, that Vanacre was seised of such a Manor, &c. and that the Lords thereof for the Time being, were by Custom immemorial bound to repair that Part of the Wall *ratione tenuræ*; Vanacre denied the Custom in that Court, and Sentence was given against him; whereupon he moved B. R. for a Prohibition, suggesting the Statute 23 H. 8. and that he was cited out of his proper Diocese, &c. intending therefore, that all was void, and coram non iudice, but the Prohibition was denied, because Vanacre by Pleading to the Libel, had admitted the Jurisdiction of the Court; and the Statute 23 H. 8. doth not take away the Jurisdiction of all Matters arising out of the Diocese; but only gives him who lives out of the Diocese, a new Privilege of Pleading if neglected, and the Party suffers a Sentence to be given against him there, the said Statute will not serve him for a Prohibition afterwards to that Court, whose Jurisdiction he hath already admitted.

23 H. 8. c. 9.

But in that Case, upon View of the Libel, it appeared, that the Ground thereof was a * Custom *ratione tenuræ*; therefore it was held clearly by the Court, that a Custom was not triable in the Spiritual Court; and this Libel having no other Foundation, the Ecclesiastical Court could have no Conusance thereof, till the Custom was tried at Law; and for that Reason a Prohibition was granted to try it, which was afterwards tried and found against Vanacre; and thereupon a Consultation awarded.

* Libel upon a Custom to pay the Church-wardens 20 l. for every Corpse buried in the Body of the Church; upon denying the Custom, a Prohibition granted. 1 Vent. 274.

And to Note a Difference, that if upon the Face of the Libel, it appears, that the Spiritual Court can have no Conusance of the Cause *ut supra*, or if it appears, that the Party cited, is an Inhabitant at a Place out of the Diocese

See 1 Roll. Abr. 287. pl. 52. 308. pl. 20. 307. pl. 18. Reg. 50. B.

case, there the Libel is Felo de se, and in such Cases the Sentence makes no Alteration; but 'tis otherwise where no such Thing appears on the Libel.

And in the Case of Tyler and Mantell before-mentioned, it was said by the Counsel at the Bar, that it appeared upon the Face of the Libel (which was for opprobrious Words spoken) that Tyler was cited out of the Diocese of London, in which Sentence was given, for he was named in the Libel to live at D. in Hampshire, and there the Fact was laid; whereas 'tis very well known, that D. in Hampshire, is within the Diocese of Winchester, and not in the Diocese of London, and Affidavits were offered of that Matter.

But it was answered by the Court, that they could not take any Notice within what Diocese D. in Hampshire was, for they could not ex officio take Notice of the Limits of Bishopricks; but they should now take it to be within the proper Diocese.

Nota, The Case between Brockman and Fagg, Trin. 2 Will. B. R. was the very same, A. Libel for not repairing Part of a Church-yard Wall, which by Custom, &c. he was obliged to repair, and the Custom was denied, and Sentence against the Defendant; but a * Prohibition granted.

* 13 Rep.
567.

D E

Term. Sanct. Trin.

I Willi. & Mariæ, in B. R.

Lea *versus* Libb. Hill. 2 & 3 Jac. II. B. R.
Rot. 497.

UPON a special Verdict in Ejectment, the Case was
as followeth :
H. Thomas Denham by his Last Will and Te-
stament in Writing devised, that his Lands
should be sold by his Executors for the Payment of his
Debts, which Will he signed and published in the Presence
of two Witnesses, (viz.) Richard Woodroffe and John
Barnes, who subscribed and attested the Will in the Pre-
sence of the Testator and no other Person but these two
Witnesses.

Shower 68.
S. C.
3 Mod. 262.
S. C.
A Will at-
tested by 2
Witnesses,
and after-
wards the
Testator
made a Co-
diciil attested
by 2 Wit-
nesses, which
he declared

should be Part of his Will, yet both together will not make a good Will.

And about a Year afterwards the said Tho. Denham
made another Writing, by which he revoked a Legacy gi-
ven by his Will, and gave another new Legacy ; and
moreover declared, that his Intent was, that his Will
should be ratified and confirmed in all Things, except what
he had altered by that Writing, and that this Codicil
should be accepted and taken as Parcel of his Last Will,
which Codicil he signed and published in the Presence of
two Witnesses only, (viz.) in the Presence of John Barnes

F 2

and

and James Head, which two Witnesses attested and subscribed this Codicil in the Presence of the Testator, and no other Person subscribed the same.

And that at the Time of making the Codicil, there was neither the first Will, nor the said Richard Woodroffe (the other Witness) there present, but absent in another Place, and that the Codicil was always separate and never annexed to the Will; and that Mary Denham (the Lessee of the Plaintiff) was Cousin and Heir of the Testator, and that the Defendant was the Lessee of the Executor of the Testator Tho. Denham.

29 Car. 2.
cap. 3.

And the sole Question was, Whether by this Will signed and attested, ut supra, the Lands were well devised within the Statute 29 Car. 2. or not.

It was argued, that the Will was void as to the Devise of the Lands, for that the Statute is express, That every Will which is not attested and subscribed in the Presence of the Testator by three or four credible Witnesses, shall be utterly void as to a Devise of Lands; and the Circumstances prescribed by this Statute concerning Wills of Lands being not observed in this Case, as it plainly appears by the Verdict, the Devise is void; and the Lands must descend to the Heir at Law, and therefore the Plaintiff hath a good Title.

Econtra.

It was argued on the other Side, that the Making this Codicil was a new Publication of the Will; and 'tis not material, Whether it was affixed to the Will, or not; for a Will is good, tho' 'tis in Two loose Sheets of Paper, and 'tis still but one Will; so in this Case, tho' the Codicil was not actually annexed to the Will, yet they both make but one Will in Law, and one is not entire without the other, but both together make the Will.

Therefore if the Will and Codicil are but one, and not distinct Wills, the Words of the Statute are literally pursued, for then there are three Witnesses who subscribed and attested the Codicil, which is Part of the Will, and the Will it self, (viz.) Woodroffe, Barnes and Head; and so the whole Will, which consists in both the Writings, was attested and subscribed by three Witnesses, in the Presence of the Testator, which is all that is required by the Statute.

Now suppose that the Testator, by a Writing, deviseth Lands, which is attested only by two Witnesses and afterwards publishes that Writing as his Last Will, in the Presence of a third Witness, who subscribes that Will in the Presence

Presence of the Testator; this is certainly a good Will to pass the Lands; to which Justice Dolben agreed; but Holt Ch. Just. denied it.

And the Court held in the principal Case, that the Will was void; 'tis true, the Intent of the Statute was to prevent Fraud; but tho' no Fraud or Suspicion of Fraud appears in this Case, yet the Statute hath prescribed a certain Method, which every one ought to pursue to prevent Fraud; therefore every good Man who would have the Benefit of the Statute, ought to pursue the Means therein prescribed, which was not done in this Case, because James Head, who was Witness only to the Codicil, could not therefore be a Witness to the Signing the Will by the Testator, which is required by the Statute. Curia.

And Holt Ch. Just. argued, that if Lands had been devised by the Codicil, such Devise had been certainly void, not being sufficiently attested, because one of the Witnesses who subscribed the Will, (viz.) Woodroffe, was in no wise concerned touching the Codicil; so on the other Side, Head, who only subscribed the Codicil, could not be a Witness to the Will which he never saw.

Afterwards in Michaelmas-Term following, this Case was argued again, and it was said in Behalf of the Plaintiff, that this Controversy depending upon the Construction of a Clause in the Statute of Frauds, (which is a new Statute) there could not be many Cases cited, neither was there Occasion to cite any, because the Words are plain and express; it was agreed, that if the Devise had stood singly upon the Will, it had been void; and then the Codicil being imperfect in it self, could not aid the Deficiency of the Will, especially since the Jury found, that the Codicil was never annexed to the Will; and that this being in the Case of an Heir at Law, it should be favoured.

It was argued (as before) for the Defendant, that both these Writings made but one Will, and this Ground was laid down in Cases of Wills, (viz.) that a Man might make his Will in several Writings, and at several Times; and if a Will is written in three several Sheets of Paper not tacked together, and subscribed by three Witnesses severally, (viz.) one Name to each Sheet, this is a good Will within the Statute, to which Justice Dolben agreed. Econtra.

So if these loose Sheets of Paper are wrap'd up in a clean Sheet, and the Witnesses subscribe their Names to that clean Sheet, this is a good Attesting the Will. 2 Cro. 144.

A Will

A Will is thus defined, (viz.) 'tis a Declaration of the Mind (either by Word or Writing) in disposing an Estate, and to take Place after the Death of the Testator; and this is called a Will; now in several Cases two Things will make that good, which singly and by it self would not be so; as for Instance, in the Case of Wigton and Garrett, in this Court, in the Time of Chief Justice Hale, where one had a Power of Revocation, so it was made by a Deed attested by three Witnesses, and afterwards by an Indenture attested by three Witnesses, he covenanted to levy a Fine to such Uses, which was levied accordingly; now in that Case neither the Deed or the Fine singly was a sufficient Revocation, but both together were sufficient.

So here both the Writings make but one Will, and the one aids the Deficiency of the other.

But Holt Ch. Just. held that this Will was void, because it was not signed by the Testator in the Presence of three Witnesses; for tho' the Words of the Statute are not express as to the Signing in the Presence, yet they amount to as much: For the Words are, that the Will must be signed by the Devisor, and attested by three or four Witnesses, so that 'tis plain the Witnesses must prove the Signing the Will, otherwise 'tis imperfect, and they cannot prove it unless they were present; so that 'tis the same Thing as if the Words had been, that the Will must be signed in the Presence of three Witnesses.

And afterwards in Hillary-Term, 1 & 2 Willi', the said Chief Justice delivered the Opinion of the Court, that the Will and the Codicil together were not sufficient to pass the Lands, for the Statute of Frauds is express, that there ought to be three Witnesses to every Will by which Lands are devised; and also that the Testator sign the Will in the Presence of three Witnesses; and there were neither of these Circumstances in the principal Case, and therefore they could not contradict the Statute.

Judgment for the Plaintiff.

Harrison *versus* Austin. Trin. 3 Jac. II. B. R.
Rot. 997.

3 Mod. 237.
S. C.

Where an informal Deed shall pass an Estate by Way of Covenant to Hand seized.

UPON a special Verdict in Escamēt, the Case was, (viz.) Thomas Winchurst being seized in Fee of the Lands in Question, made a Deed-Poll in these Words following:

ff. To all Christian People, &c. Know ye that I having no Issue, and in Case I die without Issue of my Body lawfully begotten, that then my Lands, &c. may remain and continue in my Blood and Kindred of me *Thomas Winchurst*; and for the natural Love and Affection I bare unto my loving Niece *Sarah Stokes*, the Wife of *John Stokes*, as also for divers other Considerations, have given, granted and confirmed, and in and by these Presents, do give, grant and confirm unto my said Niece *Sarah Stokes*, all my Lands, &c. to the Use and Uses herein after-mentioned, and to no other Uses or Purposes whatsoever; that is to say, To have and to hold all the said Lands to the Use and Behoof of me the said *Thomas Winchurst*, for the Time of my natural Life; and after my Decease, to the Use of the said *Sarah Stokes* my Niece, and to the Heirs of her Body lawfully begotten; and for Default of such Issue, to the right Heirs of me the said *Thomas Winchurst*. In Witness, &c.

Nota, This Deed was not executed by any Livery, &c. but afterwards the said *Thomas Winchurst* made a Feoffment of all his Lands, to the Use of the Defendant *Austin*; and then *Stokes* and his Wife entered upon *Austin* the Feoffee as for a Forfeiture accrued to them by the Feoffment made by *Winchurst*, who was only Tenant for Life (as they intended) and made a Lease to the Plaintiff in Ejectment.

And it was argued for him, that this Deed shall be taken as a Covenant to stand seised; for all Constructions of Deeds must be such ut Res Valeat, and the Intent of the Parties must be observed as near as possibly it may: Now here it plainly appears, that the Intent of *Tho. Winchurst* was, that *Sarah Stokes* should have an Estate-Tail, and if this Deed should not be construed as a Covenant to stand seised, then she will have no other Estate but a meer Possibility, (viz.) for her own Life, if she should survive *Thomas Winchurst*; for an Use raised out of an Estate for Life, cannot continue after the Estate is determined out of which it was raised; so that by such a Construction the plain Intention of this Deed would be altogether subverted.

'Tis true this Deed is not formal, but the Informality will not hinder its Operation by way of Covenant to stand seised.

For the Plaintiff.

1 Inst. 49.
Poph. 49.
Roll. 2 Part
786.

1 Mod. 176. *Crossing versus Scudamore.*

But

Econtra.

But it was argued for the Defendant, that by this Deed the Intent of Winchurst appeared to be, that he designed Sarah Stokes should take nothing if he had Issue of his Body; for the Words are, If. In Case I shall die without Issue of my Body, then, &c. and therefore it would be a very hard Construction if upon such a voluntary Consideration, this Estate should be expounded to pass as a Remainder after his Death to the said Sarah in Tail; tho' his Intent appeared, that Sarah should have nothing, unless he died without Issue of his Body.

Now the Purpose of this Deed was, that it was the Intent of Winchurst, that the Estate should pass by way of Transmutation of Possession, and not by way of Covenant to stand seised; and if so, then Sarah had an Estate for Life; and Winchurst by his Entry was only Tenant at Will, and such a Tenant cannot commit a Forfeiture.

The Habendum in this Deed being contradictory to the Premises, shall be rejected, and the Premises pursued, and many Cases were cited in which it had been held, that if the Words in a Deed shewed the Intent to pass an Estate by the Common Law, it shall never be construed to pass by way of Use.

But the Parties agreeing amongst themselves, a Motion was made concerning the Costs of Suits for the Plaintiff; and upon hearing of Counsel on both Sides, and reading the Rule of Court which had been voluntarily entered into upon the Agreement; it was ordered, that the Plaintiff should have 10 l. Costs; and then the Court declared, that they were all of Opinion for the Plaintiff, (viz.) that the Consideration and the Deed it self were sufficient to raise an Use in Remainder in Tail to the said Sarah Stokes by way of Covenant to stand seised.

Moseley *versus* Cocks.

Upon a Writ of Error, the Plaintiff did not sue forth a *Sci' fa' ad audiend' Errores* in Time.

THE Plaintiff brought a Writ of Error upon a Judgment obtained against him; and afterwards the Record was removed into B. R. he for some Time neglected to sue out a *Scire facias ad audiend' Errores*; whereupon the Plaintiff in the original Action sued out a *Sci' fa' quare executionem non habet*; and upon two *Nihil*s returned had Judgment, and Execution executed.

And now the Plaintiff in Error moved to set aside this Judgment on the Sci. fa. because his Errors were assigned on the Record; but upon Examination it appeared, that they were assigned in a private Manner without any Notice given to the Defendant in Error.

And the Chief Justice Holt declared, that the Parties upon the Removal of the Record by the Writ of Error, have no Day in Court given to either of them; wherefore if the Plaintiff in Error delay to sue forth his Sci. fa. ad audiend. Errores, the Defendant hath no way to compel him, but by suing out a Sci. fa. quare Executionem non, &c. and if upon such a Sci. fa. the Plaintiff in Error doth not plead that his Errors are assigned; but suffer Judgment to pass upon two Nihils, no Errors afterwards assigned shall prevent Execution.

Nota, The usual Practice is, that the Defendant in the Writ of Error, by Consent, doth voluntarily take Notice of the Assignment of Errors, and this Consent is testified by his Pleading in nullo est Erratum; and there is no Occasion for a Sci. fa. ad audiend. Errores.

King *versus* Dilliston. Trin. I Jac. II. C. B.
Rot. 1322. See now the Statute 9 Geo. c. 29.

ERROR of a Judgment in the Common Pleas, upon a special Verdict in Ejectment, in which the Case was thus:

If. The Lands in Question were Copyhold held of the Manor of Swelling Campsey in Suffolk, of which Henry Warner and his Wife, in Right of his said Wife, were seised for the Life of the Wife, Remainder to John Ballett in Fee.

1 Lutw. 765.
S. C.
3 Mod. 221.
S. C.
Salk. 386.
S. C.

An Infant who is entitled to be admitted to a Copyhold Estate, forfeits it, if he is not ad-

mitted after three Proclamations.

That the Custom of the said Manor was, that every Surrender which is made secundum consuetudinem out of Court, shall be presented by the Homage at the next Court to be held for the said Manor; and that upon such a Presentment, Proclamation had been usually made, and so for three Courts next following; and if upon the third Proclamation, no Person came to be admitted, &c. that then the Lord of the Manor should seize the Lands as forfeited.

G

That

That Henry Warner and his Wife, and John Ballett joined in a Surrender of these Lands out of Court, to the Use of Robert Freeman in Fee; but that after the said Surrender, and before the next Court, the said Robert Freeman died, and that John Freeman is his Son and Heir, an Infant, and within Age, and that he had a Right to be admitted.

And that afterwards at the next Court, this Surrender was presented by the Homage, and Proclamations were made in three Courts next following, and no Person came to be admitted; and therefore the Steward of the said Manor issued out a Precept to the Bailiff, to seise the said Lands into the Hands of the Lord, which was done accordingly; and they find that A. C. is Lord of the said Manor, and that he entered on the Lands as forfeited ex causa pradieta, and made a Lease thereof to the Plaintiff; and that Judgment was given in the Common Pleas for the Defendant; and the Record being removed by Writ of Error into B. R. it was argued for the Plaintiff in Error.

4 Rep. 21. That Custom is the Life of all Copyhold Estates, and that if the customary Tenants break the Customs of the Manor, they are no more than Tenants at Will.

That the Admittance of a Copyholder is for the Benefit of the Lord, and not of the Tenant; and that it would be unreasonable if the Obstinacy of a Tenant should be prejudicial to the Lord who is in no Fault; and it would be a great Prejudice to the Lord, if in this case the Infant should not be obliged by this Custom, for he may die, and the Right descend to another Infant, and for a long Time; so that by such Means the Lord may be deprived of the Profits of his Inheritance, (viz.) the Fines upon Admittances.

3 Rep. 99.

That this Case differs from Sir Rich. Letchford's, for in that Case he who had the Right by Descent was beyond Sea at the Time when the Proclamations were made; but in this Case the Infant is the Heir of the Surrenderee, who died before Admittance; and is a * Purchaser, and the Purchase is not compleat till he is admitted.

* Jones 319.
2 Cro. 226.

And the Attorney General Treby who argued for the Plaintiff, told the Court, that he had seen an ancient Manuscript of Sir Richard Letchford's Case, in which 'tis reported, that he had actually seised the Lands, and taken the Profits thereof to his own Use, quousque he who was beyond Sea should come and be admitted.

So

So in this Case, after the Infant had made Default, the Lord might enter and take the Profits to his own Use as a Penalty, quousq; the Infant should come and be admitted; and this Course will not be prejudicial to him, because he may have the Lands at any Time when he will be admitted; and 'tis not reasonable that the Lord should lose all the Services of his Tenant without any Manner of Recompence, and here he hath no Tenant to do any Services.

Several Cases were cited, in which Infants were obliged to observe Circumstances, even upon the Penalty of forfeiting their Estates; as where an Infant breaks a Condition annexed to his Estate, or commits Waste, in such Cases 'tis a Forfeiture notwithstanding the Infancy.

On the other Side it was argued, that Infants are always exempted out of general Customs which create Forfeitures; and for an Authority in Point, Sir Richard Letchford's Case was cited, where it was held, that an Infant beyond Sea, or in Prison, is not within this general Custom, for in such Cases the Law implies an Exception.

That there is a Difference between this Case and Conditions annexed to Estates at Common Law, for in the last Case transit cum onere, and therefore if the Infant will have the Estate, he must observe the Condition upon which it was granted; but in the principal Case there is no Condition annexed to the Infant's Estate.

In Michaelmas-Term following it was argued again for the Plaintiff, and said, that the Nature of a Surrender afforded a good Reason to support his Title; for a Surrender is to no other Purpose, but to give a Fine to the Lord, and that is the only Intention of the Custom to surrender and admit.

'Tis not contended in this Case that the Infant should forfeit his Lands for ever, but only the * Profits thereof till he is admitted; so that the Infant is obliged by the Custom, but not upon the Penalty of forfeiting his Inheritance (as others are), but upon the Forfeiture of the Profits quousq; and so Letchford's Case is good Law, and warrants this Case quoad the Profits.

An Infant shall be compelled to attorn upon a Writ of per quæ servitia; and if it had been found to be the Custom, that the Lord might seize the Profits upon the Default of the Infant's Admittance, this had been a good Custom; 'tis true, the Verdict found that the Lord

Whittingham's Case, Lib. 8. 44. Latch 199. 2 Roll. Rep. 72. 1 Leon. 100. *Econtra* for the Defendant.

For the Plaintiff.

* 2 Cro. 226.

† Cro. Eliz. 351.

* 3 Cro. 879.
1 Leon. 1.
1 Inst. 111.
2 Leon. 209.

Contra for
the Defen-
dant.

might enter generally for a Forfeiture; but that doth not conclude him from claiming the Profits only; as it was said in * Butler and Baker's Case, (viz.) If a Man distrain claiming such a Duty, yet he may abate for another Duty; and the Authorities in the Margin were cited for the Plaintiff; and that Pasch. 29 Car. 2. between Bertlee and the Merchant-Adventurers, it had been adjudged, that the Custom of Foreign Attachment is good in a Corporation, tho' a Body Politick cannot be committed for a Default, according to the Words of the Custom.

The Counsel who argued for the Defendant took Exception to the Verdict, (viz.) that the finding the Custom was not good, for 'tis only found, that the Lord upon such Default had used to seise, but did not say how, or to whose Use, as by Distress, or for a Forfeiture of the Lands, or the Profits thereof; and that there is a Difference between an Infant who is Heir by Descent, and an Infant Purchaser quoad the Custom, for in the first Case the Lord wants his Tenant to perform his Services; but in the other Case the Surrenderey continues Tenant till the Admittance of the Surrenderee.

Style 46.
2 Sid. 61.

† Plowd. 359.

Besides, in this Case the Surrenderee cannot forfeit any Thing, because he had nothing to forfeit; and the Surrenderey cannot forfeit, because the Surrender was lawful, and he was in no manner of Fault; and the Lord had no Injury done to him, because the Surrenderey still continued his Tenant; and the Defendant in this Case doth not claim the Lands as a Purchaser, for when he is admitted, he will be in by Descent, because the Surrender was made to his Father, and his Heirs, where the Word Heirs is a Limitation, and not a Word of Purchase, and the Lord may lawfully make a Guardian to the Infant, and so admit him by Guardian, and that will entitle him to a Fine; and Whittingham's Case differs from this, for there the Infant had committed a wrongful Act, (viz.) he made a Feoffment in Fee, which was executed by Liberty by Attorney, and therefore he ought to be punished as he was; and the Case in the † Margin was cited as an Authority in Point.

But by the Opinion of three Judges, the Judgment was affirmed, the Ch. Justice Holt being of another Opinion, (viz.) That it was a Forfeiture by the Surrenderey, because he had surrendered his Estate to one who would

not be admitted, and this Forfeiture shall have no Respect to the Infant.

That if a customary Heir by Descent will not come in after three Proclamations, to be admitted, the Lord might enter and take the Profits to his own Use * quousq; and he compared this Case to a Tenure in Chivalry, where the Lord is to have the Guardianship of the Infant quousq; so where an Infant Copyholder makes a Lease without License, this is a temporary Forfeiture, for which the Lord may seise, &c. quousq; the Infant shall re-enter and avoid the Lease; so if an Infant Lessee for Life makes a Feoffment, this is likewise a temporary Forfeiture, quousq; the Re-entry of the Infant.

The Judgment affirmed by Three against one.

Chetliam *versus* Sleigh. Mich. I Jac. II.
Rot. 96.

ERROR of a Judgment in the Court of Common Pleas on a Formedon in Remainder, the Case was thus:

II. Formedon in Remainder against the Tenant, who was admitted by Attorney to plead to Issue; and on the Day of Nisi prius an Essoin was cast for the Tenant, which was challenged by the Demandant, and thereupon the Tenant demurred, and the Essoin was adjourned to a certain Day in another Term; and a special Impar lance was taken to that Day, at which Day the Tenant appeared by his Attorney, and the Appearance was entered on Record, and the Essoin was quashed, by the Opinion of the whole Court, because the Tenant in this Cause could not be essoined when he was admitted by Attorney to plead, and so he is out of Court, but 'tis otherwise where the Attorney is removed, and his Removal appears on Record; and thereupon the Demandant prayed Judgment final against the Tenant, and Judgment was given quod recuperet seisinam, upon which Judgment Error was brought in B. R.

And it was argued for the Plaintiff in the Writ of Error, that the Essoin being quashed for Insufficiency, it shall turn to a Default of the Tenant, and thereupon a Petit Cape ought to be awarded against him to save his Default; and if he doth not come in upon the Return thereof,

3 Lev. 67.
S. C.

Error of a Judgment in a Formedon in Remainder, &c.

For the Plaintiff.

nor

nor shew any Cause to save his Default, then final Judgment shall be given; but no Judgment at all before the Return of the Petit Cape.

And the Cases in the * Margin were cited to prove, that an *Essoin* challenged, adjourned, and adjudged against him for wh. m. it was cast, shall turn to a Default, upon which a Petit Cape shall be awarded, and not a Judgment final.

* 40 Ed. 3.

19. b.

1 Ed. 3. pl. 1. 2.

2 Ed. 4. 13.

16.

11 H. 4. 87.

9 H. 5. 12.

797

Dyer 115. 341. 353. 11 Rep. 39. 1 Cro. 517. W. Jones 412. 1 Roll. Abr.

Kelw. 41. 3 H. 4. 4.

Yelv. 211.

2 Cro. 292.

1 Bull. 159.

161.

5 Rep. 86.

Penrin's Case.

1 Inst. 295. b.

9 H. 6. 58. b.

10 H. 6. 24. a.

12 H. 7. 10. b.

Moreover this Diversity was taken, that upon the Default of the Tenant at a certain Day given by a special Impar lance, a Petit Cape shall be awarded, if upon such special Impar lance the Tenant is out of Court, and not demandable till the Day appointed; but 'tis not so upon a Default on a general Impar lance, without any certain Day, for there the Tenant is supposed to be in Court, and demandable at all Times; therefore if he make Default upon any Demand, Judgment final shall be given, because this is a Departure in Despite of the Court; and to this Purpose is the Practice and Entry of all Common Recoveries, (viz.) After the Toucher hath entered into Warranty and pleaded to the Disceisin, &c. the Demandant petit licentiam interloquendi & habet, &c. & postea isto eodem Termino idem (the Demandant) revenit in Curia, and the Tenant being solemniter exactus non venit sed in contemptum Curie recessit, &c. Ideo consideratum, &c. quod recuperet.

Afterwards, in Michaelmas-Term following, it was farther argued for the Plaintiff, that an *Essoin* is in Nature of an Excuse for the Non-appearance of the Party at a Day given, and a * Default is the Non-appearance at that Day; and that there are two Sorts of Defaults, the one before and the other after Appearance; there is also another Default, but improperly so called, (viz.) where upon a general Impar lance the Party makes Default when he is demanded; now this is a Departure in Despite of the Court, upon which Judgment final shall not be given, but a Grand Cape upon a Default before Appearance, and a Petit Cape upon a Default after Appearance; and so it ought to be in this Case.

* See 1 Inst. 259. b. where the several Excuses to save a Default are enumerated; and 1 Inst. 134. b. what great Favour is shewn to the Possessors of Lands, whereby to maintain their Possession.

Besides no Person shall be received at any Time to save his Default, but upon the Return of a Process; and therefore the Entry, that the Tenant was demanded, is insignificant; because he can make no Answer till the Petit Cape is returned; for if the contrary should be allowed then a Feme, or a Reversioner would have no Time to be received to defend their Right upon the Default of the Tenant.

7 H. 4. 14 a.

There is a Difference between an Imparlane to a certain Day, and a general Imparlane; for upon Default at the Day, a Petit Cape shall only be awarded; but in the last Case Judgment final shall be given, because 'tis a Departure in Despite of the Court.

And the Reason is, because the Term is accounted in Law but as one Day; and therefore he cannot appear, and likewise make Default in one Day.

The Cases cited in the Margin are to prove, that in a Writ of Right, where the Issue is joined upon the mere Right, a Default after such Issue joined is final; but the Principal Case was upon a Formedon, and so there is a Diversity.

10 H. 6. 7.

7 H. 4. 19.

Dyer 98.

5 Rep. 85.

2 Cro. 219.

2 Sand. 46.

1 Inst. 294.

F. N. B. 12. a.

Dyer 98.

5 Rep. 85.

2 Cro. 219.

2 Sand. 46.

1 Inst. 294.

F. N. B. 12. a.

Dyer 98.

5 Rep. 85.

2 Cro. 219.

2 Sand. 46.

1 Inst. 294.

F. N. B. 12. a.

Dyer 98.

5 Rep. 85.

2 Cro. 219.

2 Sand. 46.

1 Inst. 294.

F. N. B. 12. a.

Dyer 98.

5 Rep. 85.

2 Cro. 219.

2 Sand. 46.

1 Inst. 294.

F. N. B. 12. a.

Dyer 98.

5 Rep. 85.

2 Cro. 219.

2 Sand. 46.

1 Inst. 294.

F. N. B. 12. a.

Dyer 98.

5 Rep. 85.

2 Cro. 219.

2 Sand. 46.

1 Inst. 294.

F. N. B. 12. a.

Dyer 98.

5 Rep. 85.

2 Cro. 219.

2 Sand. 46.

1 Inst. 294.

F. N. B. 12. a.

Dyer 98.

5 Rep. 85.

2 Cro. 219.

2 Sand. 46.

1 Inst. 294.

F. N. B. 12. a.

It was argued for the Defendant, that this Effoin was illegal, and 'tis admitted, that it turned to a Default; and that it being at the Day of Nisi prius makes it different from the common Cases of this Nature; and the Cases in the Margin were cited to prove, that a Default is final after Issue joined; and that the Judgment shall not be final upon a Default at the Day of adjourning the Effoin, if the Party will waive his Effoin; but if he will stand to the arguing it, and the Effoin is adjudged insufficient, 'tis otherwise.

F. N. B. 12. a.

Dyer 98.

5 Rep. 85.

2 Cro. 219.

2 Sand. 46.

1 Inst. 294.

F. N. B. 12. a.

Dyer 98.

5 Rep. 85.

2 Cro. 219.

2 Sand. 46.

1 Inst. 294.

F. N. B. 12. a.

This Case was argued again in Hillary-Term, Anno 1 & 2 Willi' & Maria, and for the Plaintiff in Error it was farther argued, that the Challenge of the Effoin was ill, because it is not averred, that the Tenant's Attorney non suit amotus; for the Form of Entries in such Cases is so.

It was agreed, that in a Writ of Right, if the Issue is joined on the mere Right, and then the Tenant makes Default, Judgment final shall be given, which is against the Resolution in Penrin's Case; but 'tis not so, if the Issue is joined upon a collateral Matter; and after the Tenant hath made Default in a Writ of Right, the Petit Cape shall be awarded; and to prove this Matter, the Authorities in the * Margin were cited.

Rast. Entr.

584, 585.

21 Ed. 4. 5.

2 H. 5. 3. 11.

11 H. 4. 87.

14 H. 4. 16.

Keilw. 133.

* 39 H. 6.

16, 17.

1 Inst. 294. F. N. B. 12. a. Dyer 301, 302. Co. Ent. 182. Bro. Tit. Droit, pl. 4.

* Roll. 1.
Abr. 484.
Bendl. 147.
151.
3 Cro. 619. Stiles 209, 389.

Then an Objection was made to the Continuance by Curia advisare vult, which was from 15 Trin. to Octab. Hilarii, omitting all Michaelmas-Term, and therefore 'tis a Discontinuance, and the Cases in the * Margin were cited to prove this Omission to be a Discontinuance.

Entra for
the Defen-
dant.

It was farther argued for the Defendant, that it was not necessary to aver in the Entry of the Challenge of the *Essoin*, that the Attorney was not *amotus*, it being only Matter of Form which ought to come on the other Side; as where a Fine is pleaded, 'tis not necessary to aver, that the Cognisor was not an Infant, nor in Prison, nor beyond Sea, at the Time of the Fine levied; for if the Fact is so, it ought to come on the other Side; and as to this Point the Court was of that Opinion.

See Brañ.
366.
2 Inst. 349.
* 12 H. 4.
14. b.
14 H. 4. 12.
14.
21 Aff. pl.
17.

And it was farther said, that by a Judgment on a Default in a Writ of Right, the Tenant is not concluded; for he may bring a Writ of Right (if he hath any) upon the Statute of West. 2. cap. 4. and the Cases in the * Margin were cited for Authorities in Point; and for the Reasons aforesaid, it was concluded by the Counsel, that Judgment in this Case was well given without any Regard had to a Petit Cape.

Register 114. a. F. N. B. 99. 2 Cro. 35. 2 Sand. 45.

* Co. Ent.
225.
1 Cro. 560.
† 32 H. 8.
cap. 21.

Holt Chief Justice held, that the Entry of the Challenge was good without the Negative Averment, that the Attorney non suit *amotus*, and to prove it, he cited the Cases in the * Margin; and as to the Continuances, and the Adjournment of the *Essoin* from Trinity to Hillary Term, omitting Michaelmas-Term, this may be done by Virtue of the Statute † 32 H. 8. by which 'tis enacted, That the Justices of the King's Courts of Record may assign special Days of Return, in such Cases and Processes as have used to have special Days assigned.

Curia.

And all the Court agreed, that the Judgment in the principal Case should be affirmed, for this Reason, (*viz*) because the Tenant upon the Challenge of the *Essoin* had demurred; and also appeared at the Day of the Adjournment of the *Essoin*, to justify his Demurrer, and so had betaken himself wholly to that Justification, by which he had percemp-

peremptorily waived and refused the Advantage of saving his Default; and therefore they held, that this Default after the Demurrer and Appearance was not savable; and if so, it would be in vain to award a Petit Cape to save a Default which was not to be saved.

But if the Essoin had been quashed upon the Challenge without any Demurrer of the Tenant, in such Case they were clear in Opinion, that a Petit Cape ought to be awarded, and not Judgment of Seisin; but that was not the Case at Bar, which differs from all the Cases cited, where upon a Default after Issue joined, a Petit Cape had been awarded.

And thereupon the Judgment of the Court of Common Pleas was affirmed.

Brook versus Cock.

DE B T upon an Escape against the Sheriffs of London, Shower 37. in which the Plaintiff declared in the Debet and detinet, as followeth:

¶ That the Plaintiff, alias per nomen Eliz. Brook executricis test'i T. S. levied a Plaint in the Sheriffs Court against one J. N. and had Judgment to recover so much for Debt and Damages; and to execute this Judgment, he sued out a Ca. sa. by Virtue whereof J. N. was taken, and in Custody of the Defendants, and that they permitted him to escape, the Plaintiff being not satisfied.

Where an Executor brings an Action in the Right of the Testator, it must be in the *Detinet* only.

The Exception to this Declaration was, that the Action was brought in the Right of the Testator, and whatever should be recovered, would be Assets in the Hands of the Plaintiff as Executrix; and therefore the Action ought to be brought in the * *Detinet* only; because the Judgment appears to be had in the Right of the Testator; and to prove this Matter, the Authorities in the † Margin were cited in Point.

† 2 Cro. 345.
Hob. 264.
Rast. Entr.
170. a.
Cro. El. 326.
Econtra.

But on the other Side, the Counsel endeavoured to shew a Difference between the Cases cited, and this at Bar; because in this Case the Plaintiff had counted generally, and not as Executrix, (viz.) Eliz. Brook queritur de

Sid. 342.
4 Rep. 35.
Plater's Case.
5 Rep. Walcot's Case fo.
36. contra.
1 Lev. 224.

* *Nota*, The Precedent in *Rastal* 170. a. agrees with the Declaration in this Case, yet there it was the *Detinet* only.

See *Sid.* 379. Debt against an Administrator in the *Debet* and *detinet*; and adjudged that it was aided by the Statute 16 Car. 2. cap. 8.

T. Cook, &c. de placito quod reddat ei so much, quas ei debet & injuste detinet, so that she declared in her own Right, and though she farther declared, that she had recovered in the Sheriffs Court per nomen E. B. Executricis, &c. this is Surplusage, and not necessary to be inserted; and therefore the Verdict and Recovery shall be taken to be in her own Right, and if so, the Action is well brought in the Debet and Detinet.

Curia.

But the Court was of another Opinion, (viz.) that it was not necessary for the Plaintiff to name her self Executrix in the Title of this Action; but that it was absolutely necessary, that in declaring upon the Recovery she ought to alledge as it was in Fact, (viz. as Executrix) otherwise there would be a Variance in the Record, and this very Action ought to pursue the very same Course with the first, for 'tis merely in the Right of the Testator.

20 H. 6. 5, 6.

Lydcott *versus* Willows.

4 Mod. 229.

S. C.

2 Vent. 285.

S. C.

Devise of an House to one for Life, and all his Messuages, &c. to his Heirs for ever; adjudged that the Reversion in Fee of the House passed.

ERROR in the Exchequer-Chamber upon a Judgment in B. R. the Case was,

H. The Testator being seised in Fee, devised such an House by Name to T. S. and E. G. and the Survivors of them, for their Lives; and afterwards by a general Clause in the same Will, he devised All his Messuages, Lands, Tenements and Hereditaments whatsoever in the Kingdom of England, (not above disposed of) to J. N. and his Heirs for ever; and the Court of King's Bench held, that by this general Clause the Reversion of the House devised to T. S. and E. G. for Life, did not pass, and gave Judgment accordingly.

The Serjeant adds a Nota, that these were King James's Judges.

For upon the first opening this Cause to the present Court, 1 Will. it was held, that the Reversion passed; and afterwards Mich. 1 Will. the Case was moved again, where the Devise was, ut supra, to two, and the Survivors, for Life, and to enable his Wife (whom he made Executrix) to pay his Debts and Legacies, he devised to her all his Lands, Tenements and Hereditaments (not disposed of) to hold to her and her Heirs for ever; he also devised to his Heir at Law 20 l. per ann. so that having taken Notice of him, the Intent was more apparent, that his Wife should have the Reversion in Fee of the House.

Allen 28.
cited to be
in Point.

Whereupon all the Judges and Barons were of one Opinion, (viz.) that the Reversion in Fee passed by those Words.

The Judgment was reversed.

Brown *versus* Farndell and Shore. Pas. 1 Willi' & Mariæ, B. R. Rot. 90.

THE Case was, one Brown (who was Brother of the whole Blood to the Plaintiff Brown) died Intestate, and without Issue, and the Wife of Farndell, one of the Defendants, was his Sister of the Half-Blood, and Administration of all the Goods of the Intestate was committed to Brown the Plaintiff; and afterwards within the Year, after the Death of the Intestate; and before any Distribution of the Goods, &c. the Wife of Farndell died, and thereupon he libelled in the Spiritual Court (before Dr. Shore) to have Letters of Administration granted to him of Part and Share of the Goods of Brown the Intestate, which belonged to his Wife in her Life-time, as his Sister of the Half-Blood, according to the * Distribution of Intestates Estates, and thereupon Brown moved for a Prohibition; and a Rule was made for a Prohibition, and that the Plaintiff should declare upon it to have the Matter in Law come in Judgment.

Shower 25.
The Sister of the Half-Blood shall have an equal Distribution with a Brother of the whole Blood.

* 22, 23 Car. 2. cap. 10.

And accordingly Brown (the Plaintiff) declared and set forth all this Matter, and the Statute of Distribution of Intestates Estates, and particularly that Paragraph by which the Manner of Distribution amongst Collaterals is directed; and also that Paragraph by which 'tis enacted, that no Distribution shall be made till a Year is fully expired after the Death of the Intestate; and moreover suggested, that the Construction of the Statutes belonged to the King in his Temporal Courts, and not to the Spiritual Court, and that the Defendant, notwithstanding, &c. had proceeded there, &c.

And upon a Demurrer to this Declaration, two Points were made, argued and adjudged.

(1.) Whether the Sister of the Half-Blood to the Intestate should have an equal Distribution with the Brother of the whole Blood.

And it was adjudged that she should; for the Words of the Statute are, to every of the next of Kindred of the Intestate, who are in equal Degree, and the Sister of the

1 Mod. cited and allowed for good Law.
2 Mod. 205.
1 Vent. 307.
T. Jones 93.

Half-Blood is in equal Degree of Kindred to the Intestate with the Brother of the whole Blood, for the one is his Sister and the other his Brother.

(2.) The second Point was upon Construction of that Paragraph by which 'tis enacted, that no Distribution shall be until after one Year after the Intestate's Death; if any Right or Interest is vested and fixed in the Parties, who are entitled to any Shares before Distribution is actually made; or whether 'tis wholly in Contingency, in which they had nothing at present, but only a Possibility if they survive the Year.

And as to this Point it was adjudged by all the Court, that an Interest was vested and fixed in the Parties entitled to have any Shares immediately after the Death of the Intestate, and the Statute doth not make any Suspension or Condition precedent to the Interest of the Parties, for that Clause is merely for the Benefit of Creditors, and doth not relate to the Interest of the Parties, &c.

And the Court held this Statute to be in Nature of a Will, for all Persons who should die Intestate, and therefore they resembled this Case to that of a Residuary Legatee; for if such a Legatee die before the Debts are satisfied, so that it doth not appear to how much the Surplus will amount, yet the Executor or Administrator of such a Legatee shall have the whole Residue, &c. which remains over, &c. and not the Executor of the first Testator.

1 Leon. 277.
Dyer 59.

So in the Case where a Sum of Money is bequeathed to T. S. to be paid when he is of the Age of twenty-one Years, and he dies before that Time, his Executor shall have the Legacy.

So in the principal Case an Interest was vested in the Wife of Farndell, immediately upon the Death of Brown the Intestate; and therefore, tho' he died before the Time of Payment, yet the Administrator of the Intestate shall have no Benefit thereof, for it shall go to the Administrator of the Wife; and Farndell her Husband having the Right of Administration to her, the Suit in the Spiritual Court is proper for him to have it granted.

Whereupon a Consultation was granted.

Note, In the Argument of this Case it was held, that if a Man dies Intestate, leaving only one Child, that such Child is within the Statute of Distribution, and that 'tis not casus omissus.

Simpson *versus* Merrill & al'. Mich. 4 Jac. II.
B. R. Rot. 370.

TRESPASS for Breaking his House and Taking away his Goods; there was Judgment against some of the Defendants by Default, and the other justified, for that the Hundred of D. &c. is an ancient Hundred, and that a Court from three Weeks to three Weeks, Time out of Mind, had been held within this Hundred, and that before the Trespass, &c. King Charles the Second was seised of this Hundred in Fee, in jure Coronæ, &c. and long before the Time, &c. made a Lease thereof by Letters Patents, to Katherine, now Queen Dowager, for Life; and that before the Trespass, (viz.) on such a Day, and at such a Court, the Plaintiff entered a Complaint there against T. S. (one of the Defendants) in Trespass upon the Case, upon which Complaint, * *Taliter processum fuit in eadem Curia secundum consuetudinem Curie quod postea scilicet ad Curiam, on such a Day, secundum cons. &c. consideratum fuit per eandem Curiam quod prædict. T. S. recuperet against the now Plaintiff 9 s. 4 d. pro mis. & custagiis suis, quia the Plaintiff non prosecutus fuit querelam suam prædictam super quo judicio præceptum emanat. fuit sub sigillo Roberti Domini Ferrers Seneschalli Curie prædict. sigillat. secundum cons. eidem Merrill Ballivo & ministro Curie, &c. direct. per quod mandatum fuit, &c. quod levare faceret the aforesaid 9 s. 4 d. on the Goods of the Plaintiff, whereupon he, on the Day and Year in the Declaration mentioned, entered into the House of the Plaintiff, the Doors being open, &c. and within the Jurisdiction of the Court, and took the Goods to the Value of 9 s. 4 d. and afterwards at another Court, &c. he returned his Precept served, and the other Defendant came in Aid, &c.*

² Lutw. 1369. S. C. Judgment in an inferior Court pleaded by *Taliter processum fuit*, good.

* This short Way of Pleading of a Judgment in an Hundred Court, held good. ² Lev. 87. Sec 3 Lev. 403. which was a justification in Trespass where it was pleaded, that the Plaintiff was indebted to T. S. within the Jurisdiction of the Court of Record of *Bury St. Edmonds*, and that for

Recovery of the said Debt, T. S. *implacitasset* the Plaintiff in that Court, & *invenit pleg. de prof.* &c. *Taliter, ne superinde processum fuit*, that postea, &c. he obtained Judgment; this was held good upon a Demurrer.

And upon a Demurrer to this Plea it was objected against it, that such a general Pleading of a Judgment in an inferior Court, and not of Record, by Way of *Taliter processum fuit*, is not good, but that the Defendant ought to set forth all the Proceedings in certain, for the Pleading by

¹² H. 6. 3. b. Co. Ent. 87. ² Mod. 102, 195.

by (A) a *Taliter processum fuit*, is only allowable where Judgment is obtained in a superior Court at Westminster, or at least in an inferior Court of Record, and not an inferior Court not of (B) Record, for the Court of B. R. hath very little Regard to the Proceedings of those Paper-Courts; therefore their Proceedings ought to be set forth, that this Court might judge whether they are regular, or not, for they are traversable, and it shall be tried by a Jury.

(2.) It was likewise objected, that the Defendant had not set forth how the Lord Ferrars came to be Steward of this Court, so that no Authority is alledged in him sufficient to award a (C) Precept.

22 Affis. pl. 72.
4 H. 6. 17.
7 H. 4. 17.
Old. Ent. 167.
Noy 17.

(3.) And lastly, it was objected, that a (D) *Levari facias* doth not lie to execute a Judgment given in an Hundred-Court; for the Process to Execution there, is a *Distringas* in infinitum. Adjournatur.

Orbell *versus* Ward. Hill. 3 & 4 Jac. II.
Rot. 1018.

3 Mod. 167.
S. C.
1 Salk. 39.
S. C.

In an Appeal
of Murder,
the Defen-
dant cannot
plead *per At-
tornatum*, for
'tis a Discon-
tinuance.

IN an Appeal of Murder brought by the Wife for the Murder of her husband Isaac Orbell, the original Writ of Appeal was in this Form:

ff. Georgius Ward nuper de Paroch. Sancti Jacobi Westmon' in Com. Middlesex attachiatus fuit, &c.

The Defendant in propria persona venit, and demanded Oyer of the Writ and the Return, which was entered in hac verba, and the Return was thus endorsed: *Executio istius Brevis patet in quadam schedula annex'*: Respons. Basil Firebrasse Mil. & Johannis Parsons Mil. Vic. Com. præd. the Schedule was thus:

ff. Ego B. F. & J. P. Vic. Com. præd. Domino Regi humillime certifico quod ego attachiavi prædict. G. Ward secundum

(A) This short Way of pleading Judgments in an *Hundred-Court*, held good. 2 *Lev.* 81. *Co. Ent.* 87. See *Yelv.* 67. 2 *Mod.* 102, 195.

(B) Adjudged, that this general Way of Pleading the Proceedings in a Court not of Record, is ill upon a Demurrer. 2 *Vent.* 100.

(C) Adjudged ill, because not set forth by whom the Precept was awarded, and that it was likewise ill, because not shewn that the Cause of Action did arise within the Jurisdiction: See *Quære* of this last Objection.

(D) In 2 *Lev.* 81, 82. it was held, that this Process of *Levari facias* was good, and that by a *Distringas* in some of the old Books, a *Levari* is intended.

exigentiam Breyis prædict' & habui corpus suum in Custodia mea until such a Day, on which an Habeas Corpus was directed to me, &c. whereupon I brought the Body, &c. before the Chief Justice, &c. at his Chamber in Serjeants-Inn, and the said Chief Justice took the Body, &c. from me, and discharged me thereof, by Reason whereof I cannot have it here, &c.

Nota, The Sheriffs Names were not subscribed to the Return, Quibus lectis & auditis prædict' G. Ward per Christophorum Guise attorn' suum venit & defend', &c. & petit judicium de Brevi prædict', because he is named in the Writ G. Ward de paroch' sancti Jacobi Westm' in Com' Midd' ubi revera & in facto there is such a Parish as the Parish of St. James infra libertatem Westm', but no Parish or Place known by the Name of St. James Westminster alone, prout, &c. & hoc, &c. unde petit judicium de Brevi; but did not plead over to the Felony, as is usual in such Cases.

And upon a Demurrer it was objected, that a Defendant in an Appeal could not plead per Attornatum; but always ought to appear and plead in propria persona. 2 Inst. 313.

To which it was answered, that the Defendant did appear in propria persona, and the Entry is so before he demanded Oyer; therefore the following Words, (viz.) per Christophorum Guise attornatum suum are Surplusage and void; so that the Pleading is then in propria persona. 2 Sand. 95.

(2.) It was objected, that the Defendant had not pleaded over to the Felony, which he ought to do; and that he ought not to conclude in Abatement without saying more, as he had done in this Case; and so are all the Precedents in Rastall and Coke's Entries, where the Defendants in Appeal plead Matter in Abatement.

3 Cro. 699.
Yel. 12, 13.

To which it was answered, and first it was admitted, that it was usual to plead over to the Felony in such Cases, but 'tis not necessary, so that for Default thereof the other Plea should be ill; for 'tis but reasonable that the Defendant in this Case, where Life is concerned, should have the same Privilege that all other Defendants have in civil Actions, and for Authorities in this Matter the Cases in the * Margin were cited.

* Broke
Appeal 66.
Co. Ent.
Tit. Appeal.

It was farther objected, that the Return of this Writ was insufficient as entered on Record, for the Default of the Sheriffs Names subscribed; for the Words, Respons. B. F. & E. P. vic', &c. on the Back of the Writ, are not suf.

* 12 Ed. 2.
cap. 5.

Curia.

sufficient; but their Names ought to be subscribed within the Return it self, (viz.) at the Bottom of the Schedule, which is strictly required by the Statute of * York, by which 'tis enacted, that the Sheriffs shall set their Names to their Return, in Pain to be grievously amerced to the King's Use.

The Chief Justice held, that upon such a Plea in Abatement without Pleading over to the Felony, the Court ought to have been moved to enforce the Defendant to plead over, or at least the Plea should be refused; but that the Plea in the principal Case was not ill upon a Demurrer, that the Defendant is not obliged in this Case to plead over the Felony, no more than a Defendant in an Appeal, who pleads a special Bar as a Release, or Autrefois acquit; and it was adjudged in Parliament, in a Case where the Defendant pleaded a Pardon in Bar, that it was not necessary to plead over to the Felony; and it was held in this Case, that if a special Bar is adjudged against the Defendant, he shall not be concluded by it, but he shall afterwards have Liberty to plead over to the Felony.

That the Pleading by Attorney was a Discontinuance; for in this Case, the Defendant could not make an Attorney; and therefore this is a Plea by a Stranger, and in Effect 'tis no Plea; and therefore ought not to be received by the Appellant; but the Plaintiff ought to move the Court for Judgment against the Defendant; for 'tis as if he had stood mute, and so the Appellant ought to do in Case the Appellee plead in Abatement, and doth not plead over to the Felony; but the Plea being accepted by the Plaintiff; 'tis therefore good without Pleading over, &c.

And so is the Return of the Schedule without the Names of the Sheriffs subscribed; for their Names on the Back of the Writ is sufficient.

That a Discontinuance in this Action is peremptory to the Plaintiff, and so Judgment was given, that the Writ should abate.

Jordan *versus* Powell. Trin. 4 Jac. II. B. R.
Rot. 595.

THE Case was, *scilicet* The Plaintiff (per Tho. Hancock) his Attorney, brought his Action against the Defendant, and declared in Assumpsit upon three Promises; the first was in Consideration of Work done, and for prosecuting and defending several Suits in B. R. C. B. and in Chancery, by the Plaintiff (as Solicitor, &c.) at the Request of the Defendant; the Second was upon an executory Consideration to prosecute and defend Suits, and acknowledging a Performance; and the Third was upon a general *Insimul computasset*.

Action by an Attorney, the Defendant pleaded the Statute, that the Plaintiff had not delivered in a Bill of Charges signed by him; *per Curiam* the Statute extends only to Fees for Counsel.

The Defendant pleaded specially, (*viz.*) That if those Promises, or any of them, were made by the Defendant to the Plaintiff, *propterea*, &c. they were made that the Plaintiff should be his Attorney and Solicitor for prosecuting and defending all Suits in the Courts at Westminster, & non aliter; and he likewise pleaded the Statute 3 Jac. I. by which 'tis enacted, That an Attorney or Solicitor shall not be allowed any Fees laid out for Counsel or otherwise, unless he have Tickets thereof signed by the Hand of them that receive such Fees; and he shall also give unto his Client true Bills of all the Charges of Suit under his own Hand, before he can charge his Client with Payment thereof; and averred that the Plaintiff had not delivered to him any Bill of Charges, &c. subscribed with his own Hand.

3 Jac. I.
cap. 7.

And upon a Demurrer to this Plea the Plaintiff had Judgment without any Argument, because the Statute extends only to Money due for Fees; and here the Defendant had pleaded generally to all the Promises laid in the Declaration, and one of them being an *Insimul computasset*, in which other Money may be included; and so if the Defendant would have the Benefit of the Statute, he ought to have pleaded, quoad the two first Promises, and not generally to all, as he had done.

Judgment for the Plaintiff.

The King *versus* Martin.

Sessions confirmed a Poor-Rate, but did not set forth, that it came to them by an Appeal.

THE Quarter-Sessions in Devonshire made an Order, reciting, that the Overseers of the Poor of such a Parish, had made a Rate by particular Assessments on the Inhabitants, for the Maintenance of the Poor of that Parish for a Year, by which Order they confirmed that Rate; but there was no Recital of any Appeal to them in Sessions from an Order of two Justices, to whom the original Jurisdiction of confirming Rates for the Poor is given by the Statute 43 Eliz. cap. 2.

Now this Order of Sessions being removed into B. R. it was moved to quash it; for that they had taken upon themselves beyond their Jurisdiction, (viz.) the original Consequence of Rates to the Poor, with which they have nothing to do, but upon an Appeal, and therefore this Order is void.

Econtra.

But on the other Side, the original Rate made by the Overseers was produced, and it appeared to be actually signed by two Justices, and Martin's Appeal to the Sessions entered thereon; and some Affidavits were read of the Truth of that Matter, notwithstanding no Mention was made thereof in the Order of Sessions, urging also, that Martin, who removed the Order, was a litigious Person, and refused to pay any Proportion towards the Relief of the Poor.

But the Court quashed the Order, because by the Statute the original Jurisdiction in this Matter is given to the two next Justices; and the Sessions have no Power, but upon an Appeal of the Party grieved, and therefore 'tis necessary that the Appeal should be mentioned in the Sessions Order, otherwise it must be taken, that they acted without any Power; and no collateral Averments in Affidavits can help this Defect, because the Authority of the Sessions must appear in the Order it self.

Boson *versus* Sandford. Hill. 1 & 2 Jac. II. B. R.
Rot. 302.

3 Lev. 268.
S. C.
3 Mod. 321.
S. C.

IN a Special Verdict, &c. the Case was thus:
II. Boson being a Mercer in Excester, brought a Special Action of Trespass on the Case against Sandford, and Se-

2 Salk. 440. S. C. Action may be brought either against the Master or Owners of a Ship where Goods are taken to freight, and damaged.

ben others, being Part-Owners of a Ship, in which Goods and Merchandize were usually transported from London to the Port of Topsham near Excester, and declared as followeth:

ff. Quod cum Josephus Boson (on such a Day and Year) at London in such a Parish and Ward deliberasset & onerasset, Anglice, had laden on Board, in & super quandam Navem, vocat. le *Companies Adventure of Exon.* unde ipse idem Willielmus Sandford (and the Seven others) ad tunc & ibidem fuerunt proprietarii ac in qua quidem Nave bona & mercimonia personarum carriationem inde requiren' communiter carriat. & transportat. fuerunt pro rationabili naulo & salario diversa bona & mercimonia ipsius Josephi Boson (viz.) Viginti & duas pecias serici undulat. Anglice, *Camlets*, (and divers other Merchandizes in particular) ad valentiam 100 l. in bono ordine & bene conditionat. a London prædict. usq; ad portum Topsham in Com. Devon. in nave illa pro eodem Josepho Boson (periculis marium exceptis) salvo transportand. pro rationabili naulo & salario per ipsum Josephum Boson eisdem Will'o Sandford (and the Seven others) pro huiusmodi carriation. & transportation. eorundum solvend. & iidem Will'us Sandford (and seven others) eadem bona & mercimonia ipsius Josephi Boson in nave prædict. sub custodia sua ex causa prædicta tunc & ibidem habuerunt & receperunt, & ad illa transportand. in nave prædicta in forma prædict. super se susceperunt prædicti tamen Will'us Sandford (and the Seven others) officium suum in ea parte minime curantes sed machinan. & fraudulenter intendentes. eundem Josephum Boson in hac parte injurare decipere & defraudare licet periculis marium non impedit sed navis prædict. ad portum de Topsham prædict. in tecto arrivavit bona & merchandisa prædict. in tali bono ordine & bene conditionat. qual. eadem fuerunt tempore deliberationis & onerationis inde in & super navem prædict. eidem Josepho Boson non deliberaverunt sed bona & merchandisa prædict. tam negligenter & improvide locaverunt & custodiverunt in nave prædict. in Viagio prædict. quod in defectu ipsorum Will'i Sandford (and the Seven others) & servien. suorum bona & merchandisa illa per aquas maritimas in eadem nave venien. madefacta spoliat. & damnificat. fuerunt & nullius valoris sive usus eidem Josepho devener. Idemq; Josephus diversa grandia Lucra comoda & proficua quæ ipse cum bonis & merchandis prædictis vendend. liciteq; barginans. acquirere & lucrare potuisset totaliter perdidit & amisit unde idem Josephus Boson

dicit quod ipse deteriorat. est & damnum habet ad Valentiam 150 l. & inde producit sectam, &c.

The Defendants pleaded jointly Not guilty, and the Jury found a special Verdict to the Effect following :

¶ They find, that Joseph Boson, in the Year and Place aforesaid, did deliver and load in and upon the Ship called, &c. in the said Declaration mentioned, of which Ship the said William Sandford, and the Seven others, were then and there Partners; they find that in this Ship the Goods of Persons requiring Carriage had been usually carried for a reasonable Salary, and that the Plaintiff delivered the Goods in the Declaration mentioned on board the Ship in good Condition, and that they were to be transported safely from London to Topsham, for a Salary to be paid by the Plaintiff to the Defendants, upon which Account the Goods were received into the Ship.

They find that one Daniel Hurd was Master of the said Ship, and the Goods were delivered to him, none of the Defendants being then present; they find that there were several other Partners of the said Ship, (viz. &c.) at the Time the Goods in the Declaration mentioned were put on board; they find that the Plaintiff did not know, but was always ignorant who were the other Partners.

They find that the Ship arrived safely at Topsham, without any Danger of the Sea, and that the Goods were spoiled by Negligence modo & forma prout, &c.

They find that the Defendant, and the other Partners, have been always ready in the said Ship to transport Merchandizes from London to Topsham and back again, for a Salary, according to the Rate of 16 s. per Tun-Weight, and that the said Daniel Hurd, who was Master of the said Ship, had only six Pounds for every Voyage, for his Wages of the Defendant, and the other Owners, and so concluded specially.

There were two Points made in arguing this special Verdict.

* 26 H. 8. 5.

Where Matter is pleadable in Abatement, the Party loses the Benefit of it, if he pleads to Issue.

(1.) Whether the Verdict had * abated the Bill by finding there were several other Partners of the Ship not named, &c.

(2.) The second was, Whether the Plaintiff had mistaken his Action, having brought it against the Owners of the Ship, when only the Master is chargeable.

As to the first Point it was argued, that the Defendants had lost that Advantage which they might have had by their Pleading

Pleading to this Action, because they did not plead the Matter in Abatement; and as for that Purpose, the Case was compared to an Action against one Executor where there are more; if that one Executor doth not plead that Matter in Abatement, but pleads to the Action, he shall never have the Advantage of such a Plea afterwards; so where Trespass is brought by one Jointenant, or by one Tenant in Common, and the Defendant pleads to the Action, and the Jury finds specially, that another (not named) is Jointenant or Tenant in Common with the Plaintiff, yet he shall have Judgment, notwithstanding the Writ at first was abateable; and so it was adjudged in the [†] Cases cited in the Margin; so where an Action of Debt is brought on a joint Bond, against one of the Obligor; and upon Non est factum pleaded, the Jury find that T. S. (then living) was jointly bound with the Defendant, yet the Plaintiff shall have Judgment.

† Cro. Eliz.
554.
Moor 466.
1 Mod. 102.

'Tis true, if this Matter had been pleaded in Time, it would have abated the Writ; and so it was adjudged in * Whelpdale's Case, for which Reasons it was insisted, that the Defendant had lost that Advantage by Pleading to the Action.

* Rep. 119. a.
2 Cro. 152.
Stead versus
Moon.

(2.) 'Tis to be considered what Relation there is between a Master and a Servant, for the Jurors have found, that Daniel Hurd, Master of the Ship, was only Servant to the Defendant for a certain Salary, and to shew the strict and reciprocal Relation between them, the Cases in the ^a Margin were cited; and how the Acts of the Servant will ^b affect the Master; and to prove that the Master is chargeable for the Contracts of his Servant, the Cases likewise in the ^c Margin were cited:

^a 11 H. 6. 16.
21 H. 7. 39,
40.
^b Dyer 161.
2 Cro. 47.
Dr. & Stud.
137.

^c Plowd. 11. Litt. Rep. 374. 3 Cro. 711. 12 H. 8. 46. 9 H. 6. 53!

Which Cases were applied to the principal Case; for Hurd, the Master of the Ship, was the Defendant's Servant, and his Labour was for their Benefit, and by Consequence his Negligence ought to be to their Loss; and 'tis agreeable to Reason, that the Defendants, who were to receive and to have the Advantage of the Freight-Money, should be charged with safe Keeping the Goods.

Besides this is a mixt Action, (viz.) for a Malefeazance, and for Matter quasi ex contractu with the Owners, who had imposed a certain Rate, according to the Weight, &c.

(9)

for transporting the Goods, and that the (A) Owners ought to bring the Action for the Freight-Money, and not the Master, therefore the Party ought to bring the Action against the Owners, for such Actions are always reciprocal.

Then it was argued from the Inconvenience, if the Servants of Carriers should be chargeable with the Goods, and their Masters should not be chargeable to the Parties in an Action; for if this should be Law, no Man would entrust any Thing of Value in the Hands of Servants, who are generally poor Men, so that by this Means it would be very prejudicial to trade, in carrying Goods from one Place to another.

Contra for
the Defen-
dants.

It was insisted, that Masters are not liable to the Contracts of their Servants, unless they are nonsolvent; now this Action is founded only on the Contract, which is entire, and made with all the Owners, therefore the Action brought against some of them is abated by the Verdict; for 'tis not the same Contract as alledged in the Declaration; as for Instance, in an Assumpsit against two Defendants, if the Jury find the Promise was made by Three, the Writ is abated; for the Promise of Three is another Promise than that made by Two.

Curia.

* Raym. 220.
S. C.
1 Mod. Rep.
85. S. C.
1 Vent. 190,
238. S. C.
Sid. 36. S. C.

As to the second Point it was adjudged, that the Action was well brought against the Owners, and the Case of * *Morse versus Sluce* was cited, which was adjudged when Hale was Chief Justice, and it was thus, (viz.) The like Action was brought against the Master of a Ship; and upon a special Verdict found, the Objection was, that the Action would not lie against the Master, but against the Owner; but it was adjudged that the Action was well brought against the Master, because it was found by the Verdict, that he had used to receive Money for Freight, and to make Contracts for transporting Goods, therefore in such a special Case the Action lies against the Master; but it was never doubted, but that it would lie against the Owners, for 'tis founded ex quasi contractu by Implication of Law; and 'tis a Rule in Law, that in all Cases where the Action is founded upon Matter ex quasi contractu, it ought to be

Fry & Marsh,
Lent Assizes
in Devon.
2 Willi. &
Maria

(A) One Fry was Owner of a Ship, and brought an *Indebitatus Assumpsit* for Freight-Money, for importing Goods from Bourdeaux to Topsham; and upon an Objection, that the Action ought to be brought by the Master, and not by the Owner, Holt Ch. Just. held clearly, that the Action might be brought by either.

joint against all Parties; and for Authorities in this Point the Cases in the * Margin were cited.

* Noy 135.
2 Saund. 345.
1 Roll. Abr.

911. Hob. 260. Hurr. 121. 1 Mod. 198. 2 Vent. 151.

And the Chief Justice, and two other Judges held, that the joint Partnership was not pleadable in Abatement by the Defendants, because it would amount to the general Issue; but that if it was pleadable in Abatement, the Defendants had lost their Time of Pleading it, and Judgment ought to be given for the Plaintiff.

And the Chief Justice said, that it was at the Election of the Plaintiff, either to bring his Action against the Master or against the Owners; and so in Case of Mariners Wages, the Action lies against either Master or Owners; and the Master or Owners may maintain an Action for Freight-Money, unless some of the Owners disagree to the Voyage, for by that Means they are exempted from the Action; and in the principal Case he held, that if the Ship had been employed only by the Defendants, tho' there might be others who had a joint Interest with them, yet the Action was maintainable by them, without naming the other.

7 H. 7. 8.
Palm. 523.
3 Cro. 569.

Judgment was given for the Plaintiff.

In arguing this Case, that between * Blackburne and Grove was cited, which was thus: A Tenant in Common of Lands, brought an Action of Trover in his own Name alone, for cutting down Trees and carrying them away: The Defendant pleaded to Issue, and in a special Verdict it was found, that the Plaintiff was Tenant in Common with T. S. not named; yet the Plaintiff had Judgment, because this was Matter pleadable in Abatement.

* Trin. 24
Car. 2. B. R.
Rot. 1216.

Ailoffe versus Scrimphire.

THIS Case was argued and adjudged in this Term:

A. The Plaintiff, Sir Benjamin Ailoffe, brought an Action of Debt against the Defendant, upon a Bond for the Payment of 500 l. and upon Oyer of the Bond, and the Condition thereof, it appeared to be for the Payment of a less Sum, (viz.) 250 l. at a certain Day, and thereupon the Defendant pleaded, *actio non*, &c. because the Plaintiff post confesionem scripti obligatorii prædicti. ac post denarii prædicti devenerunt debit. & solubil. eidem (the Plaintiff)

Defeasance,
where 'tis
pleadable in
Bar, where
not.

de

de prædict. (the Defendant) & ante exhibitionem billæ prædictæ. (viz.) on such a Day ipse idem (the Plaintiff) per quoddam factum suum convenit & concessit to and with the Defendant, quod ipse idem, the Plaintiff, ad aliquod tempus vel tempora extunc in posterum pro & durante Termino 99 Annorum, a die datus ejusdem facti, &c. non sectaret prosequeretur implicaret vel perturbaret corpus personam vel statum, Anglice, the Estate, ipsius (the Defendant) hæred. executorum vel administratorum suorum vel alicujus eorum vel ratione aliquarum summæ vel summarum monetæ debiti vel debitorum, Anglice, Duties, vel demand. quorumcunq; ei adtunc debet. vel solubil. Anglice, owing, vel per ipsum (the Plaintiff) demandabil. de vel a præfat. (the Defendant) & hoc, &c. & unde, &c.

* 21 H. 7. 24.

30, 31.

7 H. 6. 44. a.

26 H. 8. 9, 10.

Cro. Eliz.

352, 623.

Hob. 88.

1 Saund. 320.

† 3 H. 6. 18. b.

26. b. 1 Inst.

207, 291.

Cro. El. 755.

2 Saund. 47,

48.

Cro. El. 352.

1 Roll. 939.

And upon a Demurrer to this Plea it was insisted for the Defendant, that this Defeasance, by which the Action is suspended for the Time therein limited, is pleadable in Bar; and to avoid Circuity of Action; and the Cases in the * Margin were cited as Authorities in this Point.

Holt Chief Justice, &c. That an Obligation is defeasible as well after the Condition is broken as before, and as to that Point the Cases in the † Margin were cited.

And the Court thus distinguished, (viz.) that where the Covenant is, that the Obligee shall not put the Bond in Suit at any Time, such Covenant is pleadable in Bar as a Release, because in Effect it is so; but where the Covenant is, that it shall not be put in Suit for a certain Time limited in the Deed; this is only a Covenant, and for a Breach thereof an Action is maintainable; but 'tis not pleadable in Bar to the Bond.

Nota, In the Argument of this Case it was allowed by all, that a Letter of License containing the Words following, (viz.) That if the Creditor sue, &c. within such a Time, that his Debt shall be forfeited, such License is pleadable in Bar; therefore in the principal Case, the Covenant being temporary and limited to a certain Time, and there being no Words in the Deed of Defeasance to make the Debt forfeited; upon a Suit commenced, &c. the Court was clear in Opinion, it was not pleadable in Bar; but that an Action of Covenant was his proper Remedy.

Judgment for the Plaintiff.

See post. Carvell. ver. Edwards.

Incedon & al' *vers.* Burges. Pas. 4 Jac. II. B. R.

TRESPASS against the Defendant, in which the Plaintiff declared for a Trespass for Eating his Grass, and for digging and carrying Turf and Stone in a certain Place called Trenshoe Down.

2 Salk. 636.
Where the
Omission of
contra pacem
is not cured
by a Verdict.

The Defendant justified by a Prescription, in which he set forth, that long before the supposed Trespass, &c. one Chichester was seised of a Messuage or Tenement called Tottiscomb, and of 100 Acres of Land, Parcel of the said Tenement; and that the said Chichester, and all those whose Estate he had, used Time out of Mind to have Common in the Place where, &c. for all their Cattle Levant and Couchant upon the said Tenement, and also to have Common of Turbary to burn in the said House, and also a Privilege to dig Stones in the Place where, &c. for the necessary Repair of the said Messuage, as appertaining to the aforesaid Messuage or Tenement, and so made a Title to the Messuage, &c. under a Lease thereof for Years made by the said Chichester, diu ante, &c. and so justified the Eating the Grass with his Cattle Levant and Couchant, &c. and digging the Turf to burn in the said House; and as to the Digging the Stones, &c. that they were digged and used, and he had employed them in and upon the aforesaid Tenements, for the necessary Reparation thereof, & hoc & unde.

The Plaintiffs replied de injuria sua propria, and traversed the Prescription aforesaid, as it was pleaded in Bar.

The Defendant rejoined by Way of Estoppel, that the Plaintiffs ought not to be admitted to the said Averment and Traverse, because the Plaintiff Incedon had aforefoits brought an Action of Trespass against the same Defendant, for a Trespass done in the same Place; and the Defendant justified, as now by Prescription for Common of Pasture, Turbary, and for digging Stones, ut supra, and the Plaintiffs then replied, de injuria sua propria, ut supra, and traversed the Prescription, and thereupon Issue was joined, and a Verdict was found for the Defendant Burges, and the Record was set forth in certain; and averred, that it was the same Title, and that this Incedon and the Incedon in the other Action are one and the same Person, and that the now Defendant, and in the other Action, is the same Person, and so concludes by Way of Estoppel by the Verdict.

K

And

And upon a general Demurrer to this Replication, an Exception was taken to the Plea in Bar, (viz.) for that the Defendant had prescribed to dig Stones to repair the House, and had justified the Digging for repairing the aforesaid Tenement, so that he varied in his Prescription, and had not brought his Case within it; for a Tenement comprehends more than a Messuage, and he ought not to employ the Stones to repair the Hedges, which are Parcel of the Tenement, because his Prescription is confined to the Messuage only.

* 18 Ed. 4.
16, 17.
Dyer 39. b.
Cro. El. 825.
between Strut-
feild and So-
merfet.
3 Cro. 708.
Hob. 17.
1 Sid. 10.

To which it was answered, that the Fault of this Plea was cured by the Replication, because the Plaintiff had not demurred to it, nor taken any Advantage thereof in Pleading; and the Authorities in the * Margin were cited to prove, that the Fault of the Bar may be cured by the Replication.

But the Court being inclinable, that this Defect was not helped by the Replication, because upon the Pleadings it shall be taken, that the Stones were employed upon all the Tenement generally; thereupon the Counsel for the Defendant objected against the Declaration, (viz.) that the Commencement of the Trespass was alledged to be in the Reign of Car. 2. continuando unto the Day of the Bill purchased, which was in the Reign of Jac. 2. and the Conclusion of the Declaration was, contra pacem Domini Regis nunc, when it ought to be, contra pacem dictorum nuper Regis Car. 2. & dicti Regis nunc; for the Words contra pacem are properly applicable to the Commencement of the Trespass, (viz.) to the Clausum fregit, and not to the Continuando.

2 Ed. 4. 24. a.
4 H. 6. 4.
Yelv. 66.
2 Cro. 377.

To which it was answered, that this was only Form, and that the Statute 27 Eliz. is, that upon a general Demurrer Judgment shall be given, notwithstanding any Want of Form; and in this Case the Demurrer was general; and the Case in the † Margin was cited to prove this was merely Matter of Form.

† Baskervill's
Case in Hob.

* 16 & 17
Car. 2.

It appears by the last Statute of * Jeofails, that the Clause contra pacem was not meer Form, because by that Statute the Want of those Words was aided by a Clerdia, which is a good Argument, that before that Statute was made, it was a Jeofail, not to be cured by any former Statutes of Jeofails, which in general Words cured Want of Form after a Clerdict; so that 'tis Substance, and not within the Statute 27 Eliz. and the Court was of that Opinion, and so gave Judgment that the Plaintiff Nil capiat per Billam.

But nota i Sid. 253. the like Exception was taken upon a general Demurrer, and adjudged merely form; but this Case was not cited by the Counsel, or remembered by the Court.

As to the Matter in Law, (viz.) the Estoppel, the Court gave no Opinion, but Judgment was given for the Defendant, ut supra.

Mason *versus* Abdy. Mich. 3 Jac. II. B. R.
Rot. 575.

DEBT upon Bond, the Condition whereof was, that whereas the above-named John Mason, at the Request of the above-bounden John Abdy, had lent and paid unto him the principal Sum of 300 l. on Adventure upon the natural Life of Robert Abdy, for the Time herein after specified; if therefore the said Robert Abdy, at the End of three Months Calendar, commencing from the Date hereof, do and shall well and truly pay, or cause to be paid, unto the abovesaid John Mason, his Executors or Administrators, the Sum of 22 l. 10s. being the Premium for the said Adventure of the said Principal for three Months; and afterwards, at the End of six Months, commencing as aforesaid, or at any Time sooner, do pay as aforesaid, the said principal Sum of 300 l. with other Premium, for the farther Adventure of the same, according to the Rate of Six-pence each Pound per Month, for all such Time whatsoever as shall be expired and spent, at such assigned Time of Payment; or if before such assigned Time or Times of Payment, and within the said six Months, the said Robert Abdy shall depart this natural Life, that then this present Obligation shall be void.

What shall
be an usuri-
ous Contract.

Quibus lectis & auditis, the said Robert Abdy dicit, &c. quod actio non, &c. because on the same Day, Year and Place in the Declaration mentioned corrupte & contra formam Statuti in hujusmodi casu nuper edit. & provis. agreeatum fuit inter prædict. Johannem & eundem Robertum quod prædict. Johannes accommodaret eidem Roberto summam 300 l. & daret diem pro solutione inde per spacium trium mensium Calendar. sed non ultra sex mensium a prædicto die quodq; præd. Robertus solveret, &c. (here recite the whole Agreement and Condition, inserting the several Sums to be pro lucro & interesse differendo & dando diem pro solutione prædict. 300 l. usq; ad such a Day prout in the Con-

dition; (omitting the Clause, that if the Defendant should die within six Months, &c.) Et ulterius prædict. Robertus dicit quod ipse prædict. Robertus prædicto tempore agreementi necnon scripti obligatorii fact. fuit in plena vita & salute & infra ætatem 38 Annorum, (viz. at such a Place) & in nullo periculo vitæ suæ amittend. Quodq; ad evitand. statutum prædict. & pro secura solutione summarum denariorum prædict. in conditione præd. specificat. ad tempus ibidem affix. scriptum prædict. cum conditione prædict. apud Paroch. & Wardam prædict. trahi & scribi per prædictum Johannem causat. fuit pro ipso prædicto Roberto sigilland. ac superinde præd. Robertus pro solutione tam præd. 22 l. 10 s. pro lucro interesse & pro differendo & dando diem solutionis prædict. 300 l. per prædictum spacium trium mensium, quam prædict. principal. summam & præd. al. denar. (as in the Condition) prædict. scriptum Obligatorium hic in Curia prolat. de penali summa 600 l. cum prædicta conditione pro solutione præd. 22 l. 10 s. & prædict. 300 l. & prædict. al. denar. modo & forma supramentionat. in performance & complement. & secundum formam & effectum corrupti agreementi ill. sigillavit & ut factum suum deliberavit, & idem Robertus ulterius dicit quod præd. 22 l. 10 s. pro interesse, Anglice, the Loan, pro differendo & dando diem solutionis præd. 300 l. ut præfertur excedunt ratam sex librarum pro interesse, Anglice, the Loan, pro differendo & dando diem solutionis Centum librarum pro uno anno per quod scriptum obligatorium prædict. vigore statuti prædict. in hujusmodi casu inde nuper edit. & provis. vacuum & nullius vigoris in lege existit & hoc & unde.

And upon a general Demurrer to this Plea, it was argued upon all the Cases of Usury cited by the Counsel; and adjudged, that this was an usurious Contract within the Stat. 12 Car. 2. cap. 13. for it was held, that if such an Evasion of the Statute should be allowed, upon Pretence, that the Principal was in Hazard for three Months, upon such a colourable Contingency, that a Man who was in full Health might die within three or six Months, the Statute would be of little Use; and if such a Contingency of the Death of a Man should prevent the Usury, it will follow, that Contingencies might be extended to the Death of Two, Three, or more; and that this Case is not like those of Bottomry-Bonds, because in those Cases there are several desperate Contingencies of the Wind, Seas, and Enemies, which Bonds are regarded in respect to Trade.

The Defendant had Judgment.

D E

Term. Sanct. Mich.

Anno I Willi. & Mariæ in B. R.

Watson *versus* Clerke.

IN this Case it was held by Holt Ch. Just. that where an Habeas Corpus is directed to an inferior Court, of which an utter Barrister is Steward, and in fact the Issue in the Plaint was not joined more than six Months after the Appearance of the Defendants there; so that by the Statute 21 Jac. the Steward had Liberty to proceed notwithstanding, and without the Allowance of the Writ; yet in this Case the Steward is bound to return the Writ with the special Matter, otherwise he shall be in Contempt; and so it was constantly ruled in B. R. when Hale was Chief Justice.

Where the Steward of an inferior Court must return a Habeas Corpus directed to him.

21 Jac. 1.
cap. 23.

Bosworth *versus* Ridgley.

SCire facias by Executors, upon a Judgment obtained by the Testator; and upon a general Demurrer it was insisted, that the Practice of this Court in such Cases is, that the Plaintiffs in the Scire facias should insert this Clause, (viz.) Proferet hic in Curia literas Testamentarias, &c. which being omitted, the Writ is not good.

Proferet hic in Curia literas Testamentarias.

To which it was answered, that the Practice is to insert that Clause at the Conclusion, and not in the Middle of the Writ; and here 'tis inserted at the Conclusion.

1 Saund. 249.
2 Saund. 402.

But

Curia.

But the Court held both Forms to be good, and that in the C. B. this Clause is always inserted in the End.
Judgment for the Plaintiff.

Bradshaw *versus* Swanton.

Prohibition will not lie where there is a Composition for Tithes.

* Yelv. 94.
2 Cro. 137.
Cro. Eliz.
188, 249.

F.N.B.43,44.
41. G.
2 Roll. Abr.
63.
Litt. Rep.
155.
Hob. 176.
2 Cro. 668.
See Reg. 38,
39.

Prohibition to the Consistory-Court of Durham, where the Libel was for Substraction of Tithes; the Suggestion now was, that a verbal Composition was made between the Plaintiff and the Defendant, for all Manner of Tithes for two Years; and the Libel was for Tithes arising within the said Time; and a Difference was now taken between a Composition for Life and for Years, for in the first Case a Prohibition lies, but not where the Composition is for Life; and to prove this, the Cases in the * Margin were cited.

To which the Chief Justice answered, and so it was resolved, that tho' several Books tell us, that a Prohibition would lie where the Composition is for Years; and where the Difference is taken ut supra; yet the Law for several Years past hath been clearly taken, that no Prohibition will lie upon any Composition, whether for Life or Years, for any Tithes; and therefore the proper Remedy is to appeal to the Arches, if the Consistory-Court should refuse a Plea of Composition.

In this Case a Prohibition was denied, quod nota.

Hammond *versus* Purfell.

Writ of Inquiry returnable a Day after the Term, but executed within the Term, amendable.

A Writ of Inquiry was returnable die Veneris prox. post Crastino Ascensionis Domini, which was a Day out of Term, but it was executed within the Term, and Damages found for the Plaintiff; and upon a Writ of Error brought, the Matter before-mentioned was assigned for Error in the Exchequer-Chamber; and now it was moved to amend the Return of the Writ.

Holt Ch. Just. If the Award of the Writ of Inquiry on the Roll is good, the Writ it self shall be amended by the Roll; so if the Writ was good, and the Award was ill, it shall be amended by the Writ; but in this Case both were defective.

Then the Counsel for the Plaintiff in Error insisted, that the Default in this Case was the Act of the Court it self, which can never be amended.

But the Court inclined to amend it.

Young versus The Inhabitants of the Hundred of Tolscomb and Mudbury in Dorsetshire.

THIS was an Action upon the Statute of Hue and Cry for a Robbery, in which the Plaintiff declared, Quod quidam personæ ignotæ, &c. apud quendam locum ex australi parte cujusdam Januæ vocat. Fair Mile-Gate, infra parochiam de Tolscomb & Mudbury in Com. præd. & infra hundred. de Tolscomb & Mudbury in Com. Dorset prædict. vi & armis assaulted him (the Plaintiff), and robbed him of so much Money.

3 Mod. 258.
S. C.
Declaration upon the Statute of Robbery, and did not say it was in the Highway, good.

Upon Not guilty pleaded, the Plaintiff had a Verdict, and it was now moved in Arrest of Judgment, for a Fault in the Declaration, the Robbery being not laid to be done in any Highway, but generally, (viz.) apud quendam locum (ut supra) so that for what it appears to the contrary, it might be done in an House or Garden, or in a Wood, for which the Hundred is not chargeable; for the Inhabitants of the Hundred are only obliged to guard the Roads; and all the Precedents are, that a particular Place is shewn in the Highway.

Cro. El. 753.

But it was adjudged that the Declaration was good, especially after a Verdict; for it shall be intended that this was given in Evidence at the Trial, otherwise the Plaintiff would have been Nonsumt; and they held, that without the Help of a Verdict this Declaration had been good; for the Highway is not mentioned in any of the old Precedents in Rastal's Entries; 'tis true, in the * new Precedents 'tis mentioned.

* 2 Saund.
374.

Besides, the Declaration is as good without any Averment, that the Robbery was done in the Highway, as 'tis without any Averment, that it was done in the Day-time, and not in the Night; for such an Averment was never yet seen in any Precedent.

The Plaintiff had Judgment.

The

The King *versus* Bonny.

3 Mod. 238.
S. C.
1 Salk. 190.
S. C.
Inquisition
upon a *Melius inquirendum* is traversable, but not an Inquisition *super visum Corporis*.

UPON a Motion for a *Melius Inquirendum* upon the Death of B. who was Felo de se above two Years before this Motion; and after two Inquests had been made by the Coroner *super visum Corporis*, upon both which Inquests he was found to be Non compos; it was now suggested, that one of those Inquests was quashed for a Fault, and the other, which now subsists, was obtained by Practice, because the Jurors were named at the Instance of Bonny, the Administrator; and Affidavits were produced to prove it; besides, the Practice is apparent by Taking the second Inquisition before the Coroner, *super visum Corporis*, which Body had been buried above a Year, and so was putrified; and therefore (admitting it was not by Practice) such an extraordinary Course ought not to be taken.

Thereupon the Court suspecting the Coroner had misbehaved himself, made a Rule for him to attend, and accordingly in Hillary-Term following he appeared in Court, and made Oath, that he took the last Inquisition *super visum Corporis*, of his own Accord; but upon the Application of the Lord Almoner so to do, whereupon he applied himself to the Attorney General for his Advice, who told him that he might do it, and thereupon he took the Inquisition without the Instance of Bonny, &c. and the Court was satisfied with this Account of the Matter, and that there was no Practice by the Coroner, and so a *Melius inquirendum* was denied.

Nota, It was agreed by all, that it was not to be justified to take the Body out of the Grave after it had been buried above a Year, for it was a common Nuisance and insufferable; therefore where the Inquisition had been quashed *super visum Corporis* a long Time after the Death, a *Melius inquirendum* might have been granted, but not another Inquisition *super visum*, &c. but *factum valet quod fieri non debet*.

* 3 Mod. 80.

Nota, In this Case, that of the * King and Heathersfall was cited, which was thus: A. An Inquisition was taken before the Coroner *super visum Corporis*, which was returned and filed; and the Lady Dorset moved for a *Melius inquirendum* upon several Suggestions of ill Practice, but

it was denied, because after the Inquisition is returned and filed, no *Melius inquirendum* shall be granted, so long as that Inquisition is in Force, and not quashed, for such an Inquisition is not traversable; but an Inquisition upon a *Melius inquirendum* may be traversed, because it is not taken *super visum Corporis*; and this was agreed by the Court to be good Law.

Matthews *versus* Carey. Pas. 3 Jac. II. B. R.
Rot. 320.

In Trespas for Taking his silver Tankard, and detaining it until the Plaintiff should pay 5 l.

The Defendant pleaded, that the City and Liberty of Westminster is an ancient City and Liberty, and that Time out of Mind there had been a Court Leet held there, and that the Plaintiff was a Resident in the said City, &c. and that at such a Court held there on such a Day, the Jury presented, that the Plaintiff (being a Chandler) melted and dissolved in his House (*infra Jurisdictionem*, &c.) great Quantities of Stinking Tallow, which putrified and infected the Air, *ad commune nocumentum ligeorum*, &c. and thereupon he was amerced and assessed to 5 l. and that the Defendant, as Bailiff of the Liberty, &c. & per mandatum of the Dean and Chapter of Westminster, Proprietors of the same, distrained the silver Tankard to levy the Amercement, but did not set forth any Authority by Virtue of any Precept or Warrant from the Steward of the Court and Liberty, &c. to distrain, &c. neither did he aver in fact, that the Plaintiff did melt Stinking Tallow.

The Plaintiff replied *de injuria sua propria*, and traversed, that he had melted Stinking Tallow in the aforesaid House, prout, &c.

And upon a Demurrer to this Replication, a Difference was taken between a Presentment, where the Freehold was concerned, or not; for one is traversable, but the other is not; and therefore the Presentment in the principal Case, not at all concerning the Freehold, is not traversable; and to prove this Difference, the Cases in the * Margin were cited.

Holt Ch. Justice held, that it was very clear, that in Replevin the Presentment is traversable, because that is an Action founded on the meer Right; but it may be doubtful,

L

Whe.

Justification in Trespas for distraining, &c. is ill, because the Defendant did not set forth, that it was by a Warrant from the Dean and Chapter, &c.

* 5 H. 7. 3. 6.
Bro. Tit. Presentment in Court 5, 15.
41 Ed. 3. 26, 27.
45 Ed. 3. 8. 6.

1 Leon. 242.
Moor 75.
Raym. 182.
2 Vent. 35.

Whether 'tis so in a Justification in an Action of Trespass, as here, because 'tis by an inferior Officer by Way of Excuse; therefore whether the Presentment is good, or not, true or false, 'tis still sufficient to excuse him from the Trespass.

2 Cro. 582.

And Justice Dolben cited a Case between Lewis and Hart in C. B. of his own Knowledge, which was Debt for an Amerciament in a Court-Leet, for a Rulance brought by the Lord of a Manor; the Defendant pleaded, and traversed the fact of the Presentment, as here; and it was adjudged, that it might be traversed; to which Holt Ch. Justice agreed, because 'tis upon the same Reason with a Replevin, *ut supra*.

Afterwards the Court inclined, that the Traverse in the principal Case was well taken, for they held that Presentments in the Quarter-Sessions of the Peace, and even in B. R. are traversable; and if 'tis so in Courts superior to the Leet, a fortiori it must be so in Presentments at the Leet.

Besides, if this Presentment should be removed by Certiorari into B. R. 'tis clear that 'tis traversable.

* Moor 573.
Cro. El. 698.

At another Day, the Counsel for the Plaintiff perceiving the Opinion of the Court to be against him, they objected against the Plea, because the Defendant had justified as Bailiff to the Dean and Chapter, without shewing any Warrant to distrain, for a Bailiff cannot by Law distrain for an Amerciament, without a Warrant from the Steward; and such Warrant or Precept ought to be particularly alleged in the Justification; the Plea is likewise ill, because the Defendant did not aver in fact, that the Plaintiff did melt sinking Tallow.

Holt Ch. Justice took these Differences between a Justification in Trespass (as in this Case) and an Avowry for an Amerciament in a Court-Leet; for in the Justification for a Trespass, 'tis absolutely necessary for the Defendant to set forth a Warrant or Precept, &c. but 'tis not necessary for him to aver the Matter of the Presentment, because his Plea is only in Excuse.

† 26 H. 8. 8.
Cro. Eliz. 14.

But in an Avowry he ought to aver in fact, that the Plaintiff committed the Crime for which he was amerced, without shewing any Authority to distrain, because he is an Actor; and a Replevin is an Action founded on the Right, and therefore in such Action the Command is not traversable.

At last the Court were all of Opinion, that the Justification or Bar was ill, because the Defendant had not set forth any Warrant or Precept from the Steward of the Court, for his Authority to distrain, and that the Allegation in his Plea, that he distrained per Mandatum of the Dean and Chapter, &c. is frivolous, for a Bailiff cannot distrain by that Means, nor otherwise than by Virtue of a Precept directed to him by the Steward of the Court, for which Reason

The Plaintiff had Judgment.

Watson versus Clerke.

A Pleint in Trespass on the Case was entered in one of the Counters of the Sheriffs of London against Watson; and before any Declaration was delivered to him, an Habeas Corpus cum causa was brought to remove it into B. R. and it was returned generally, that at such a Court Venit (Clerke) & affirmavit quendam querelam (versus Watson) in placito transgr. super casum ad damnum 500 l. unde exitus inter partes junct. existit & adhuc pender indiscuss. &c.

Where an Action is founded on the Custom of London, and removed by Habeas Corpus, a Pro-cedendo shall be allowed.

And now it was moved for a Procedendo, upon a Suggestion, that the Action was commenced in the aforesaid Court for scandalous Words spoken of Clerke by Watson, (viz.) for calling her Whore, which is actionable there by the Custom of London, but not elsewhere; therefore if a Procedendo should be denied, Clerke would lose her Action; and moreover by this Means all such Actions would be destroyed and lost against the Custom; and an Affidavit was produced, wherein Clerke deposed, that the only Cause of Action was ut supra.

And a Difference was taken between an Action brought on a By-Law, and removed here into B. R. and an Action brought on the Custom of London; for in the Case of the By-Law, the special Matter of such Law ought in certain to be returned upon the Habeas Corpus, &c. otherwise the Court cannot take Notice of such a private Law; but it is not so in an Action founded on a Custom of London, because the Court ex Officio will take Notice of those Customs.

But the Court did not allow this Distinction, and Holt Ch. Justice said, that it doth not appear by this Return, what was the Cause of Action, that the Declaration it self ought to be returned upon the Habeas Corpus, and then the

Curia.

Court would see what was the Cause, &c. and if the Matter was delibered before the Plaintiff had declared, yet he ought immediately to enter his Declaration, that it be returned upon the Habeas Corpus, so that the Cause of Action might appear to the Court; and that all the Proceedings ought to be returned in this Case as well as in an Action upon a By-Law.

Afterwards, the Court considering that the Action would be lost, if a Procedendo should be granted, they allowed the Officer to amend the Return of this Habeas Corpus, and to make it special, ut supra.

And thereupon a Procedendo was granted.

Salter versus Kidgley. Trin. 1 Willi' & Mariae,
B. R. Rot. 349.

One who is
no Party to
a Deed may
covenant
with another
who is a
Party.

IN Covenant, &c. The Plaintiff declared quod (the Defendant) per quoddam scriptum factum (at such a Day and Place) ejus alteram partem sigillo ipsius Kidgley sigillat: & hic in Curia prolat. reciting as followeth: Imprimis, (here all the Deed was recited) and the Breach assigned was, that one Rock had not paid Rent to the Plaintiff.

The Defendant stated Oyer of the Deed, which was entered in hæc verba, and it was to the Effect following, (viz.) Articles of Agreement made between John Salter, of the one Part, and Charles Rock, of the same County, Baker, (but did not say of the other Part) as followeth: Imprimis, That the said John Salter doth for himself, his Heirs and Assigns, set and let one House or Tenement, called, &c. unto the said Charles Rock, for the yearly Rent of, &c. payable quarterly: And whereas the aforesaid Charles Rock hath agreed, and taken the House aforesaid, paying the Rent quarterly, and leaving it in good Repair; and that the said Rent may be satisfied, as aforesaid, be it known unto all Men, that I John Kydley do covenant for my self, &c. on the Behalf of the said Charles Rock, that is to say, that the said Charles Rock shall pay the Rent and perform the other Covenants, &c. reciting them particularly, &c. which Deed was sealed by Rock and Kydley; and after Oyer, the Defendant demurred generally.

And it was argued for him, that he was not bound by this Covenant, because he was not a Party to the Deed; and 'tis a Rule in Law, that he who is not a Party to the Deed,

Deed, can neither give or take any Thing by it, &c. except 'tis by Way of Remainder, which is not this Case; and for Authorities in Point, the Cases in the * Margin were cited.

2 Cro. 359. 1 Inst. 352. Roll. 72. See 3 Lev. 138.

* 3 Cro. 56.
2 Inst. 613.
2 Roll. Abr.
220.
2 Lev. 74.

It was argued for the Plaintiff, that this Deed was in Nature of two Deeds upon one and the same Piece of Parchment, (which might very well be, as it was agreed on all Sides) and therefore the Defendant shall be obliged by it; and it doth not appear in this Case, whether the Deed was indented, or not; so that if 'tis taken as a Deed of the first Person, and a Stranger, he may be very well obliged by such a Deed to have any Thing performed as a Fidejussor, which in former Days was a customary Form; and to prove this see the Cases in the † Margin.

† 40 Ed. 3. 5.
Fitz. Abr.
Tit. Oblig. 16.
F.N.B. 146.B.

Also one who is not a Party to the Deed may be made an Attorney by the Deed it self, to make Livery and Seisin upon a Feoffment. 1 Inst. 52. b. and where an Attorney is made by a Deed, to which he is a Stranger, the Deed it self may be by Indenture as well as by Deed-Poll.

3 Cro. 905.
Noy 49. b.

Holt Ch. Justice held, that one Party to a Deed could not covenant with another, who was no Party, but a meer Stranger to it; but one who is no Party to a Deed may covenant with another who is a Party, and thereby oblige himself by Sealing the Deed.

Reg. 165. b.

The Court was clear in Opinion, that the Action did lie against the Defendant upon this Deed.

The Lord Lovelace's Case.

THE Lord Lovelace being Chief Justice in Eyre of all the King's Forests, &c. upon Oath made before him by T. S. one of the under Officers of the Forest of Dean, that A. B. and C. had killed several Does, and cut and felled Wood and Trees growing in the Forest, granted a Warrant under the Seal of his Office out of Court, directed to a Messenger to take the aforesaid Persons, by Virtue whereof he did take them into Custody, and there kept them thirty Days; afterwards they removed themselves into B. R. by Habeas Corpus, upon which all this Matter was returned.

Warrant of the Chief Justice in Eyre, directed to a Messenger, is not good.

And

* 1 Ed. 3.
cap. 8.

† Reg. fo. 8. l.
F. N. B. 67.

And now it was argued for the Plaintiffs in the Habeas Corpus, that the Chief Justice in Eyre had no Power to grant a Warrant to take the Body of any Man upon such an Information, *ut supra*; for the * Statute is express, that no Man shall be taken or imprisoned for Vert or Venison, if he is not taken in the Manner, &c. or first indicted, &c. and for other Authorities in this Point, the Cases in the † Margin were cited.

But admitting that the Chief Justice in Eyre had an Authority to make this Warrant; yet it being directed to a wrong Person, the Taking is unlawful, for the Warrants of such Chief Justice ought to be directed to one of the Officers of the Forest, and there is no such Officer in the Forest as a Messenger; and this Case resembles that of a Justice of the Peace, who cannot direct his Warrant to his Servant, or to any other Person whatsoever, but to the Constable or Parish-Officers; therefore this Commitment was wrongful.

Econtra.

It was argued on the other Side, that the Complaint made by the Statute 1 Ed. 3. was altogether against ministerial Officers of the Forest, and not one Word therein concerning the Chief Justice in Eyre, therefore his Authority is not restrained by that Statute; and moreover it was the constant Practice in former Days, to grant Warrants *ut supra*, and the ancient Practice is always the best Expositor of old Laws; and it would be very inconvenient for the King, if the Law should be, that a Warrant cannot be granted before the Offender is presented, because upon the first Notice thereof the Criminal might fly, and so escape unpunished; and this Case was likewise resembled by the Counsel to that of Justices of Peace and Constables, who may lawfully take Criminals in the Fact; and Justices of Peace may grant their Warrants upon Information, and before any Indictment, to apprehend them.

Curia.

But the Court was of Opinion, that the Cases were not parallel, because the Authority of Justices of Peace and Constables is express by the Statute to apprehend Malefactors; but in the principal Case, the Statute 1 Ed. 3. is express to the contrary, and for the Reasons aforesaid, but especially for that the Warrant was directed to a Messenger, when no Officer of the Forest is known by that Name, this Commitment was held unlawful, and all the Parties were discharged by Rule of Court.

Nota,

Nota, It was agreed by three Judges in their Argument of this Case, that Taking in the Manner was, when a Man was taken in the very Fact, or ready to do it, as with his Bow bent, or ready to slip his Dogs, or with his hands bloody, and that finding Timber of the Forest in a Man's Possession, (viz.) in his Yard (as was the Case of one of the Persons committed) was not a Taking in the Manner within the Statute aforesaid; but the Chief Justice doubted as to that Matter, but all agreed that the Taking upon a fresh Pursuit was a Taking in the Manner.

What is Taking in the Manner.

Eccleston versus Petry alias Speke.

THIS was a Trial at Bar in Ejectment, wherein the Title of the Plaintiff was as Heir at Law to the Lady Speke, who died seised in Fee of the Lands in Question; and to prove his Pedigree in order to make out his Title as Heir, &c. he offered an Answer in Chancery, made by the Defendant Speke (when he was an Infant) per Guardianum, in which Answer the Pedigree was confessed.

3 Mod. 259.
S. C.
Shower 89.
S. C.
Where an Infant answers per Guardianum, he is not concluded by any Matter in such Answer.

But the Counsel for Speke opposed the Reading this Answer, because it was made upon the Oath of the Guardian, and not of the Infant himself, and therefore not to be allowed as Evidence against him; for the Effect of an Infant's Answer to a Bill in Chancery, is to no other Purpose than to make proper Parties, so as to have an Opportunity to take Depositions, and to examine Witnesses to prove the Matter in Question, and an Infant is never concluded by any Matter contained in his Answer per Guardianum.

But the Court being doubtful Justice Eyres went to the Court of Common Pleas then sitting, to know the Opinion of the Judges of that Court in this Point; and they were all of Opinion, that the Answer of the Infant was no Evidence against him, and therefore it ought not to be read; to which the Court agreed, and so it was rejected.

Then it was offered in Evidence viva voce, that at a Trial in Ejectment between Sir William Gerrard and the now Defendant, for Parcel of the Lands now in Question, the Defendant produced a Deed of Release, which had a Clause in it to prove the Pedigree.

What shall be admitted for Evidence, what not.

But it was objected, that this Evidence ought not to be allowed, because the now Plaintiff was not Party to that Suit

Suit in which the Release was produced, & Res inter alios acta non nocet; and another Reason was given, why this should not be Evidence, because it ought to be mutual, but the Court will not permit the Counsel for the Defendant to give such Evidence; and it was compared to the Case of Depositions taken to perpetuate the Testimony of Witnesses, if afterwards a Witness should die; yet the Depositions shall not be Evidence, but only between the Parties to the Suit.

Curia.

But the Court held this to be good Evidence, and it differs from the Cases put, for here the Defendant might give that very Deed in Evidence, if he would; and 'tis reasonable, that the Plaintiff should have the same Advantage to prove it viva voce, and the rather, because the Defendant hath the Deed in his Custody, and might disprove the Witness, if he swore falsely.

But the Pedigree being proved, the Case was thus for the Defendant: *scilicet* The Lady Speke, about two Years since, had, by her Will in Writing now produced, devised these Lands to the Defendant.

A second Will shall not revoke the first, if the second is not a good Will in Law, but void.

But the Plaintiff, in order to set aside that Will, produced another Will subsequent to the first, subscribed by three Witnesses, by which Will the Lady Speke had likewise devised these Lands to the Defendant; and it was proved by the very Witnesses to this Will, that the Testatrix did sign it in their Presence, but that they did not subscribe it in her Presence, for that she signed it in her Bed-chamber, and they subscribed it in the Hall; and it was positively proved, that it was not possible to see from her Chamber what they did at the Table in the Hall, there being a Passage, of eight or ten turning Stairs between those Places; it was also proved, that the Testatrix continued in her Chamber all that Time the Witnesses were subscribing.

Whereupon it was insisted for the Plaintiff, that tho' this last Writing was not a Will sufficient to pass Lands, according to the Circumstances required by the Statute, by which 'tis expressly enjoined, that the Witnesses must subscribe in the Presence of the Testatrix; yet it was a Deed of Revocation sufficiently executed within the sixth Paragraph of the Statute; for as to a Revocation, 'tis not required by the Statute, that the Witnesses should subscribe in the Presence of the Party revoking, so that by this Deed the first Will is revoked; and if so, then the Lands must descend to the Lessor of the Plaintiff.

But the Court was of another Opinion, (viz.) that as ^{Curia.} to the Devise of Lands, the later Will was void for the Defect before-mentioned; but they held clearly, that it would not operate so as to be a Revocation of the Will, because that would be contrary to the apparent Intent of the Testatrix; for 'tis plain she designed it to be her Will (and not to be a Revocation) because it bears the Title of her Will.

Now the sixth Paragraph of the Statute concerning Revocations is, That a Will shall not be revoked, unless by some Will or Writing attested by three Witnesses, &c. which must be intended, that if the Revocation is by Will, it must be such a Will so qualified as in the former Paragraph, (viz.) A Will signed and subscribed in the Presence, &c. which this was not, therefore it cannot be a Revocation by Will; and it plainly appears, that the Testatrix never intended this Writing to be a Revocation, but by making it her Last Will, which 'tis not, because 'tis void.

Nota, In this Case Sir Geo. Sheers's Case was cited and allowed, &c. which was adjudged in the Court of Common Pleas, and it was thus:

See full. 688.
 A. Sir George Sheers being sick in Bed, made his Will, which he signed in the Presence of three Witnesses, but he being very ill, the Witnesses withdrew into a Gallery, and there subscribed it, between which Gallery and the Bed-chamber where the Testator lay, there was a Lobby with glass Doors, and the Glass broken in some Places; and it was proved that the Testator might see from his Bed where he lay (tho' the Lobby and the broken Glass Windows) the Table in the Gallery where the Witnesses subscribed their Names; and this was adjudged a good Will to pass Lands within the Intent of the Statute, for it shall be deemed to be subscribed in his Presence, as far as a Man may see in an House.

Nota also, That in Speke's Case it was held by the Court arguendo, that this Statute had not taken away Revocations of Last Wills by Acts in Law, as if the Testator should afterwards make a Feoffment contrary to the Will, or any other Act inconsistent with it; but that such Revocations remain as they were before the making this Statute.

Judgment for the Defendant Speke.

Sarsfeild *versus* Witherly.

See the Report and Entry of this Case.

2 Vent. 293.
Bill of Exchange drawn by one who is not a Merchant but a Gentleman, makes him liable upon the Custom, &c.

Cro. El. 201.

Econtra.

Curia.

1 Roll. Rep. 43, 401.

THIS was a special Action on the Case founded upon a Bill of Exchange drawn in France by the Defendant (the Son of Dr. Witherly) upon his Father here, in which the Plaintiff laid the Custom too general, (viz.) Between Merchants & alias personas ibidem residentes & negotiantes, &c. and that the Defendant was a Merchant, and drew the Bill; and he set forth, that the Bill was protested, per quod, &c.

The Defendant pleaded specially, that he is a Gentleman, and Son and Heir of Sir Tho. Witherly, and traversed, that he was a Merchant; and upon a Demurrer to this Plea the Defendant had Judgment in B. R. and upon a Writ of Error brought in the Exchequer-Chamber,

It was argued for the Plaintiff in Error, that a Consideration of a Promise is never traversable, nor allowed to be traversed; but 'tis the Promise it self which is traversable; and that it was always held, that in these Cases of Bills of Exchange, that the very Act of Drawing a Bill makes the Drawer a Merchant, within the Custom, as to a special Purpose to make him responsible to the Party upon Non-payment; and therefore he is concluded to say the contrary in an Action brought against him upon such Bill.

This Declaration is special, and in many Cases the Matter may be specially traversed, which probably might have been given in Evidence upon the general Issue pleaded; (to which the Court inclined) moreover the Custom of Merchants (as to drawing Bills) never extends to any who are not Merchants; for if the Custom should be so general as the Plaintiff hath set forth in this Declaration, (viz.) between all Persons negotiantes, then 'tis not Custom but Common Law, and if so the Declaration is not good, because 'tis special.

But the Court held it to be reasonable, that the Defendant should have Liberty to traverse the special Matter, because the Declaration was special; and a Difference was taken between a Consideration of a Promise which is executed, and a Consideration which is executory; for the one is not traversable, but the other is.

At last, upon Consideration had of the Inconveniencies which might ensue, and the Suspicion which might encrease amongst

amongst foreign Merchants, upon Bills of Exchange, if Persons who took upon themselves to draw such Bills should not be liable to the Payment thereof; they all agreed that the Judgment should be reversed.

Carter *versus* Dowrish. Hill. 3 & 4 Jac. II. B. R.
Rot. 836.

ERROR of a Judgment in B. R. in an Action of Covenant, which was to pay all Bills of Exchange, which one T. S. his (the Defendant's) Factor should draw on him (the Defendant) payable to the Plaintiff, or Order; the Breach assigned was, that the said T. S. had drawn a Bill of Exchange for 400 l. upon the Defendant, payable to the Plaintiff, or Order, and that the Defendant had accepted the said Bill, but refused to pay the Money, &c.

3 Mod. 226.
In a Declaration the Custom of Merchants ought to be set forth, but 'tis otherwise in a Plea.

The Defendant pleaded, that the Plaintiff *Secundum consuetudinem mercatoriam* had endorsed the said Bill to one I. N. who endorsed it to I. D. and that he (the Defendant) had paid 100 l. Part thereof to the said I. D. and tendered the Residue to him, which he refused to accept.

And upon a Demurrer to this Plea the Plaintiff had Judgment in B. R. because the Defendant did not set forth in his Bar specially, what the Custom of Merchants was, for upon such a general Allegation *ut supra*, the Court will not take Notice *ex Officio*, what the Custom is.

And now upon Error brought in B. R. the Court seemed to be of another Opinion, (*viz.*) that they ought *ex officio*, to take Notice of the Law of Merchants, because 'tis Part of the Law of the Land; and especially they ought to take Notice of this Custom concerning Bills of Exchange, because 'tis the most General amongst all their Customs; and moreover, that the Courts of Law have, *ex officio*, in several Cases, taken Notice *de lege mercatoria*; as for Instance, of the Law of * Survivorship amongst joint Merchants, and likewise of scandalous Words spoken of them in respect to their Trade; so they held this Plea good, being general, *ut supra*; but probably it might have been otherwise in a Declaration on a Bill of Exchange; for there the Plaintiff should set forth what is the Custom of Merchants.

Curia.

Yelv. 136.

* The Survivor has no Right.

The Judgment was reversed.

Heblethwait *versus* Palms.

3 Lev. 133.
S. C.
3 Mod. 48.
S. C.
In Trespass,
&c. a Decla-
ration is
good upon
the Posses-
sion against a
Wrong-doer.

IN an Action on the Case for diverting a Water-course, the Plaintiff declared, that the Defendant maliciously, &c. infringed a certain Mill-dam, & perinde did divert the Water-course ab antiquo & solito Cursu erga the Corn-mill of the Plaintiff, by Reason whereof he lost the Profits of his said Mill; but did not set forth that the Water used to turn his Mill, or that he had any other Profit thereof, or that the Water-course was Antiquus aquæ Cursus, &c.

The Defendant pleaded specially, that he is and was seized of such a Piece of Land upon which the Dam was erected, and by which the Water had used to run to his own Mill, which was lately burnt down, by Reason whereof he had no Manner of Use for the Water, and therefore he broke the Dam prout ei bene licuit.

There was a frivolous Replication and Rejoinder, and thereupon the Plaintiff demurred; but the Dispute was only concerning the Sufficiency of the Declaration and the Bar.

It was argued for the Plaintiff in Error, that the Declaration in the original Action was not good, because the Plaintiff did not set forth, that his Mill was an ancient Mill, nor did he prescribe to have a Water-course, or shew that he had any Benefit by it; for all that he alledged was, that the Water runned towards his Mill, and not that it turned the Mill, or did any other Service.

Besides he did not positively alledge, that there was an ancient Water-course, (so that a Traverse might be taken of that Matter) but only under the Perinde, for he set forth, that the Defendant broke the Dam, & perinde did divert the Water-course ex antiquo & solito cursu, which is no Affirmance or Averment that might be traversed; therefore this is not like the Cases in our Books, where in such Actions 'tis laid, that the Water currere debuisset & consuevit to such a Mill, for these Words amount to a Prescription.

But here the Plaintiff had only shewn, that the Defendant had diverted the Water-course out of its ancient Channel, but did not pretend that the Dam which was broken, and by which the Water did run, was upon his own Land, but founded his Action meerly upon diverting the Water-course, without shewing he had any Benefit by the Water, therefore

therefore the Damages laid under the per quod, are to no Purpose.

As to the Plea, it was good, because it set forth the Truth of the Matter, and the Defendant had no Means to traverse the Antiquity of the Plaintiff's Mill, or of the Water-course.

On the other Side it was argued, that the Bar was ill, for 'tis nothing but a collateral Story, and no direct Answer to the Declaration, and at most 'tis only argumentative; and the Court inclining to that Opinion, the Dispute rested wholly upon the Sufficiency of the Declaration; and it was argued that the Declaration was good upon the Possession alone, without any other Matter for prima facie, that is sufficient to maintain an Action of Trespass against a Wrong-doer; for in several Cases where a Man hath the Possession, tho' he hath no Property in the Goods, he may have Trespass, &c. Econtia.
Palm. 200.
See Luttrell's Case.
4 Rep.

This Action is of the same Nature with an Action of Trespass, and therefore good upon the Possession only, and that the Words ab antiquo & solito cursu, amount to as much as if it had been said de jure currere debuisset & consuevisset.

The Judgment was affirmed, but Holt Ch. Justice said, that if the Cause had been tried before him, the Plaintiff should have proved his Mill to be an ancient Mill, otherwise he should have been nonsuit. Curia.

And Justice Dolben cited a Case between * Hare and Bassett, adjudged Anno 23 Car. 2. which was an Action for Stopping an usual and convenient Way to his (the Plaintiff's) Land; and this Declaration was held good, without shewing a Title. * T. Jones
157.

Lewis versus Weeks.

IN an Action of Debt upon a Judgment in an Hundred-Court, the Plaintiff declared quod cum (the Plaintiff on such a Day) apud W. in Com. Somerset ad Curiam hundred. de Norton Ferrers coram sectatoribus (without naming them) ejusdem Curiae ad tunc & ibidem tent. secundum cons. ejusdem Curiae a tempore cujus contrarium, &c. recuperavit versus (the Defendant) 3l. 3s. tam pro damnis suis quam pro mis. & custagiis suis, &c. unde convict. est prout per memorandum ejusdem Curiae plenius liquet & apparet Debt upon a Judgment in an inferior Court in which the Plaintiff declared, that at such a Court coram sectatoribus, without naming them; 'tis ill, but cured by Verdict.

parat ac Judicium prædict. adhuc in suo pleno robore & effectu existit minime reversat', &c. per quod actio accrevit, &c.

Upon Nil debet pleaded, the Parties were at Issue, and there was a Verdict for the Plaintiff; and now the Defendant moved in Arrest of Judgment, for that the Declaration was too general, because where the Plaintiff recovers in a Court not of Record, the Declaration ought to be special setting forth all the Proceedings in certain, that this Court may be apprised of their Jurisdiction, and also of the Regularity of their Proceedings.

And there is always some Difference in declaring in an Action of Debt upon a Judgment had in a Court of Record, and upon a Judgment obtained in a Court not of Record; for in the first Case 'tis sufficient to declare generally, ut supra; but in the last Case, the Declaration always ought to be special; and in the principal Case, the Action being founded on a Judgment obtained in the Hundred Court, which is not a Court of Record; and the Declaration being too general, 'tis therefore ill.

Then it was objected, that the Plaintiff in his Declaration had not named the Suitors as he ought, because they are the Judges of this Court, and that for these Reasons the Declaration was ill.

Yelv. 16, 17.

Holt Ch. Justice said, that he never knew any good Reason for that Distinction in declaring on a Judgment had in a Court of Record, and in a Court not of Record; 'tis true, a Distinction hath been made, but without any Reason; but in this Case he held, that the Declaration was too general and concise; for at least he ought to have set forth the Names of the Suitors, who were the Judges.

But at last it was adjudged, that these Defects were cured by the Verdict; and that it shall be intended, that all this Matter was given in Evidence at the Trial.

So the Plaintiff had Judgment.

Stephens *versus* Etherick.

After a Verdict on a Writ of Inquiry the Plaintiff cannot discontinue if the Defendant will not consent.

IN Covenant brought by the Father of an Apprentice upon the Indenture of Apprenticeship; there was Judgment by Default against the Defendant (the Master); upon a Writ of Inquiry very small Damages were given, with which the Plaintiff being not satisfied, moved for Leave to discontinue

discontinue the Action; to which the Court answered, that they had no Power to give such Leave, without the Consent of the Defendant, which in this Case he refused.

But the Counsel for the Plaintiff insisted, that the Court had Power to give Leave to discontinue, without the Consent of the Plaintiff, because the Award of the Writ of Inquiry on the Roll is no other than a Rule of Court, and no Judgment; and 'tis clear, that after a special Verdict found for the Plaintiff he may discontinue; and this was laid down for a Rule, (viz.) where-ever a Writ is abateable by the Death of the Plaintiff, there he may discontinue without the Assent of the Defendant.

On the other Side it was said, that the Award of the Writ of Inquiry on the Roll was such a Judgment, that afterwards the Plaintiff could not discontinue, because the Defendant is out of Court, and hath no Day in Court, and therefore the Suit is determined; and an Action which is determined cannot be discontinued.

Holt Ch. Justice, 'Tis certain that the Action may be discontinued by the Assent of the Defendant, and that even after a Verdict it may be discontinued by such Assent, and that there was no Difference (in Respect to the Continuance) between a Verdict upon Issue joined and a Verdict upon a Writ of Inquiry; and it was held, that the Plaintiff could not by Law discontinue, without the Assent of the Defendant.

11 Rep. Met.
calfe's Case.
1 Saund. 23.

Econtra.

Raft. Entr.
144.
Dyer 195.
Sid. 16.
Saund. 37.

Curia.

Skinner *versus* Kilby. Trin. 1 Will. & Mar. B. R.
Rot. 833.

IN an Action of Covenant upon a Lease for Years of a Mill, rendring Rent, the Breaches following were assigned.

1. The Plaintiff in Fact saith, that 20 l. for the Rent of the Premises for seven Years, ended at such a Day, were in arrear, and not paid to the Plaintiff.
2. Another Breach was, that the Defendant had permitted the Mill to be uncovered, and out of Repair.
3. The Third was, for that the Defendant had not delivered up the Premises to the Plaintiff, at the End of the Term, secundum formam Indenturæ.

The Defendant pleaded as to the first Breach in Non-payment of Rent, that he from Time to Time, at the se-

Upon a Negative and an Affirmative, if the Defendant concludes his Plea in Bar and not to the Country, 'tis ill; of which Advantage may be taken upon a general Demurrer.

verbal

veral Days of Payment, had paid the Rent to the Plaintiff, Et hoc paratus est verificare.

And as to the Repairing, he pleaded, that it was sufficiently in Repair, and concludes likewise as before, Et hoc paratus est verificare.

And as to the not yielding up the Possession, he pleaded, that before the End of the Term, (viz. on such a Day) quidam T. S. habens bonum jus & titulum ad molendinum prædict. in & super molendinum prædict. intravit & ipsum (the Defendant) a possessione inde expulit & amovit & adhuc extratenet & hoc similiter paratus est verificare unde petit judicium si, &c.

And upon a general Demurrer to this Plea it was objected, that it was ill for two Causes; the one was, because the Defendant had pleaded, that he paid the Rent, which is a direct Affirmative to the Negative in the Declaration, that he had not paid the Rent, &c. and so is his Plea as to the Repairs, (viz.) that the Mill was in Repair, which is a direct Affirmative to the Negative in the Declaration, that it was not in Repair, and therefore the Defendant ought to have concluded to the Country, and not in Bar to the Action with hoc paratus est verificare; for 'tis a Rule in Pleading, that upon the first Affirmative and Negative, and so e contra, an Issue ought to be joined; otherwise the Pleading may be in infinitum; now here was an Affirmative and a Negative, and yet the Defendant concluded in Bar thereof, as to that Part, 'tis ill.

* 2 Lev. 37.

3 Lev. 325.

It was Virtute

dimissionis ei

inde fact. an-

te confectio-

nem Indentu-

re, &c. This

was held

good without

shewing by

whom the

Demise was made.

Lib. 4. 80.

Noke's Case,

where the Plea was,

that such a Person re-

covered by Verdict,

is not good,

without shewing

that the Recoveror

had an elder Title.

Then the Pleading the Expulsion in Form, as aforesaid, is ill, (viz.) * Quod T. S. habens bonum jus & titulum intravit, &c. which is too general, incertain and insufficient; for he ought to shew, that T. S. had a Title paramount and superior to the Lessor, who granted this Lease to the Defendant; for 'tis probable that he might have a good Title under the Defendant himself, by Assignment of the Term, and therefore that can be no good Cause of Excuse.

4 Rep. 80. b.

2 Saund. 178,

179.

The Counsel for the Defendant thus distinguished, viz. that where an Affirmative came after a Negative, there Issue ought not to be joined, but ought to be left on the other Side; but where the Affirmative was first, and the Negative came after, there it ought to be joined.

But the Ch. Justice Holt never heard of such a Distinction, and therefore gave little Regard to it; but for the Reasons and Defects, *ut supra*, the Court held the Plea to be ill in Substance, and therefore Advantage might be taken upon it on a general Demurrer.

Judgment for the Plaintiff.

Wilkins versus Wilkins.

IN Assumpsit, &c. the Declaration was quod cum the Plaintiff, on such a Day, was possessed of Goods and Chattels contained in a certain Box; and also of 4 Packages, to the Value of 50 l. in the Whole; and whereas the Defendant, at the same Time, was Master of a Ship called the Fortune of London, and about to take a Voyage from thence to Jamaica; the Defendant in Conf. that the Plaintiff, at the Request of the Defendant, had delivered to him the aforesaid Goods; he the said Defendant promised to dispose the Goods, and to render an Account thereof to the Plaintiff at his (the Defendant's) Return, &c. from his Voyage; but that the said Defendant not regarding his Promise non disposuit bona & catalla nec ad aliquod tempus after his Return, &c. dedit aliquem computum inde, altho' often required, &c.

1 Salk. 9.
Where an Assumpsit lies, and not an Action of Account.

The Defendant pleaded in Abatement protestando, that the Goods delivered were not of that Value prout, &c. pro p'to petit judicium de Billa, for that he on the Day and Year aforesaid, was the Plaintiff's Bailiff, de prædictis bonis & catallis ad merchandizand. and to render an Account of the Profits to the Plaintiff prout superius per billam prædict. plene apparet; and therefore the Plaintiff ought to have brought an Action of Account against the Defendant, and not a Bill of Trespass on the Case, & hoc, &c.

Dyer 20.
1 Inst. 172.
1 Roll. Rep. 52.

And upon a Demurrer to this Plea, three Judges were of Opinion, that this Action would lie, because it was brought upon an express Promise, and not upon a Promise by Implication.

But Holt Ch. Justice doubted, and told the Plaintiff that he would not permit him to give all the Account in Evidence, or to enter into the Particulars thereof, but that he should direct his Proof only as to the Damages which he had sustained for not accounting according to the Promise, for he would not ravel into an Account in such Actions.

Nota, The Trial was to be before him at theittings, and a Rule was made, that the Defendant should answer over.

N

Crosse

Crosse versus Gardner.

3 Mod. 261.
Case for
falsly affirm-
ing the Goods
to be his
own, when
they were
the proper
Goods of an-
other, with-
out saying
Sciens they
were the
Goods of an-
other, good.

CASE, &c. in which the Plaintiff declared quod cum (on such a Day) colloquium suit between the Plaintiff and the Defendant, concerning the Buying and Selling two Oxen, which the Defendant then had in his Possession, and he (the Defendant) adtunc & ibidem falso & malitiose affirmabat, that those Oxen were his (the Defendant's) proper Goods, to which the Plaintiff giving Credit, bought the said Oxen of the Defendant for so much Money, when in Truth the said Oxen then were the proper Goods of T. S. and that he the said T. S. postea, &c. lawfully recovered the said Oxen from the Plaintiff, and licet (the Defendant) sapius requisit. suit, yet he refused to give the Plaintiff Satisfaction for the same.

Upon Not guilty pleaded, the Parties were at Issue, and the Plaintiff had a Verdict; and now it was moved in Arrest of Judgment, that the Declaration was ill, and that this Action would not lie, because the Plaintiff had not laid in his Declaration, that the Defendant (Sciens that these were the Oxen of T. S.) did affirm them to be his Oxen.

Besides, he did not alledge this to be done deceptive, neither did he set forth any Warranty, but generally, that the Defendant did affirm these to be his (the Defendant's) Oxen, which is not sufficient to maintain this Action, because a Man may be mistaken in his Property and Right to a Thing, without any Fraud or ill Intent.

But the Court was clear in Opinion (upon Consideration of this Declaration) that the Action would lie upon a bare Affirmation, ut supra; and that this Case differed from the Books cited, because here the Plaintiff had no Means to know to whom the Property of these Oxen did belong, but only by the Possession; and to prove that this Action would lie, the Authorities in the * Margin were cited.

Judgment for the Plaintiff.

Shuttleworth *versus* Garnett. Trin. 4 Jac. II. B. R.
Rot. 965.

St. James.
35. Lomb.
151.

3 Mod. 239.
S. C.
3 Lev. 262.
S. C.

Assumpsit lies
for a Fine of a Copyholder, and not Debt, by three Judges; *contra*, Holt Ch. Justice, who held Debt to be the proper Action.

THE Case, *J. Catherine Shuttleworth, Widow and Administratrix of the Goods of Sir Richard Shuttleworth, her late Husband, brought an Action on the Case*

against

against Garnett, and declared after this Manner, (viz.) quod cum (the Defendant) in vita prædictæ R. S. (the Intestate) existen' tenen' quorund' Customar' ten'orum Parcel of the Manor of D. which Manor præd' Ric'o ut filio & hæredi J. S. Ar' patris sui defunctæ descendisset indebitat' fuit eidem R. S. in 40 l. pro rationabili & customar' fine debit' & solubil' eidem R. S. super mortem prædictæ J. S. pro tementis prædictis quæ tunc tenuit de prædictæ J. S. ut de manerio suo prædictæ per fidelitatem reddidit & solvend' rationabilem finem upon the Death of every Lord of the said Manor, to be set at the Will of the Heir of every such Lord, & per eundem R. S. in vita sua post mortem prædictæ J. S. patris sui supra prædictæ (the Defendant) debito modo secundum consuetud' manerii imposuit Et sic indebitat' existen' ipse idem (the Defendant) on such a Day and Year) super se assumpsit & eidem (the Intestate) fideliter promisit solvere, the said 40 l. which he had not paid, per quod, &c.

Upon non assumpsit pleaded the Parties were at Issue, and the Plaintiff had a Verdict, and now it was moved in Arrest of Judgment, that this Action would not lie, it being for a Fine, which is an Inheritance, and labours of the Realty; for 'tis Parcel of the Tenure of the Lands, which plainly appears by the Declaration it self; and 'tis clear that an Action of Debt will not lie for a Rent-Service, which is an Inheritance, and where Debt will not lie this Action is not maintainable.

Holt Chief Justice was of Opinion, that the Administratrix might bring an Action of Debt, and that it was her proper Remedy; but an Assumpsit is an Action of an inferior Nature; and if it will lie for this Duty, then the Duty it self is in its Nature inferior to a Debt on a Bond, which Debt must therefore be paid by an Executor before this Duty; but this would be very strange, because the Fine issues out of the Lands, and is merely in the Realty.

He likewise held, that Debt would not lie for a Quit-Rent issuing out of a Copyhold, but Eyre Justice doubted of that Matter, and cited * Ognell's Case, and Yel. 135. that a Quit-Rent is not within the Statute 32 H. 8. cap. 37. and therefore an Executor cannot bring an Action of Debt for the Arrears; and the said Judge farther said, that this Duty was of the same Nature as a (A) Relief for which an Assumpsit will lie, and for the same Reason it will lie

(A) Debt will not lie unless by his Executors. 1 Inst. 47. B.

Debt will not lie for a Relief by the Lord himself. 1 Inst. 162. B. 4 Rep. 49. B.

* Cro. 102.

2 Leon. 179

2 Cro. 393.

W. Jones 329.

† 1 Vent.

298.

for this Duty; and for this Purpose the Cases in the * Margin were cited.

Nota, It was admitted by all, that Debt would lie for a Fine upon an Admittance to a Coppyhold.

And in arguing this Case, that of the † Lord Mayor of London and Goree was cited, which was lately adjudged in B. R. which was an Assumpsit for a Sum certain due for Scavage, (which is a certain and customary Duty for all Goods and Merchandizes imported in London) and there it was adjudged, that the Action would lie notwithstanding the Duty was the Inheritance of the Lord Mayor, &c.

To which Holt Chief Justice replied, that the Cases were not parallel, for the Duty of Scavage doth arise out of Things in the Personalty; but the Duty in the principal Case issued out of the Realty.

But Judgment was given for the Plaintiff by three Judges against the Opinion of the Chief Justice.

Parkinson's Case.

3 Mod. 165.

Mandamus
denied to
restore a
Fellow of a
College.

Mandamus to restore Parkinson to a Fellowship in Lincoln-College in Oxford, who was actually possessed of the Freehold of his Fellowship there, but was expelled.

Resolved by all the Court, that a Mandamus should not be granted to restore a Fellow or Member of any College of Scholars or Physick, because those are private Foundations, and governed by particular Laws of the Founders; for which Reason this Court cannot take Notice of their private Ordinances.

Besides every Fellow of a College when he is admitted to a Fellowship, he accepts it under such a Condition, that he shall submit to the Government of the Masters of that College; and that if any Injury is done to him by an inferior Officer, his Remedy is by way of Appeal to the Masters; for this Court hath no Power to intermeddle; and the Lord Chief Justice Hale was always of that Opinion.

The Law is the same in Case of an Hospital, and Dr. Merrick's Case who was one of the College of Physicians, was adjudged accordingly, and so was Ayloffe's Case.

* 1 Mod. 82.

1 Lev. 23, 65.

2 Lev. 14.

Raym. 56,

94, 100.

Sid. 94, 152,

346.

And Holt Chief Justice cited * Appleford's Case, which was a Mandamus to restore him to a Fellowship of New-College; the Return was, *N.* That by the Founder's Laws they might expel any one who had committed an enormous Crime;

Crime; and that Appleford had committed an enormous Crime, and therefore they expelled him; that he appealed to the Assize who was the Bishop of Winchester, who confirmed the Expulsion; and concluded to the Jurisdiction of the Court; and this was held a good Return, though it did not mention what manner of Crime Appleford had committed, so that it might appear whether he was lawfully expelled or not; for it was not necessary to mention the Crime, because the Court had no Authority to intermeddle with it.

And the Chief Justice said, that the Colleges in the Universities were Lay-Corporations, and that the Founders, their Heirs and Successors, are Assizes; but where the Corporations are Spiritual, there the Bishop of the Diocese is Visitor.

Brandlin versus Millbank.

DEBT against the Defendant as Heir, who pleaded in Bar, that T. S. who was likewise jointly and severally bound with his Ancestor had paid the Money; the Plaintiff replied non solvit, upon which they were at Issue; and the Plaintiff had a Verdict, and general Judgment in C. B. and now upon a Writ of Error in B. R. it was insisted for the Plaintiff in Error, that the Judgment against the Heir in this Case ought to be special, (viz.) of the Lands descended, and not general as here.

Debt against an Heir and a general Judgment was given him, and good.

But on the other Side it was said, that this Point was well settled in * Davis and Popy's Case, with which the Register agreed.

† 1 Cro. 436.
Poph. 153.
W. Jones 88.
* Plow. 440. a.
Regist. 140. a.
Curia.

The Court referred to Roll's Abr. Tit. Heir, where it was full in this Point; and that there were several Judgments recited, and likewise if a special Judgment should be given, in such Case, it would be Error; and a Distinction was made between Debt and a Sci. fa. against the Heir upon a Judgment had against his Ancestor; for if in a Sci. fa. the Heir plead a false Plea, and 'tis found against him, yet the Judgment shall be of the Lands descended only, for the Execution in such Case shall be upon the first Judgment against the Ancestor, and not upon the Judgment in the Sci. fa. quod habeat Executionem, because such Judgment did not alter or enlarge the first Judgment; and so it was adjudged in the Case of * Bowyer versus Rivett.

* Poph. 193,
153.
1 Cro. 296.
3 Bulst. 317.
W. Jones 87.

The Judgment general was affirmed.

The

The King *versus* Fairfax.

3 Mod. 269.

Justices have Power to Place an Apprentice in Husbandry against the Consent of the Master, but not a Tradesman.

* This is now remedied by the Statute.

Contra.

* Raym. 65, 66.
The King *versus* Gilliflower.

Curia.

Certiorari to remove an Order of Sessions, by which the Order of two Justices was confirmed upon the Application of the Overseers of the Poor, for putting an Apprentice upon Fairfax against his Will.

Nota, This was a general Order without mentioning what Trade or Profession Fairfax used; and now it was moved to quash it, because the Justices had not Power by the Statute 5 or 43 Eliz. to impose an Apprentice on another against his Will; for by the first Statute the Justices have only Power to bind poor Children to Husbandry; but by the later Statute they may bind them to Trades, and for that Purpose they have Power to raise a Stock by way of Assessment upon the Parish, of which there would be no Occasion, if they had Power to bind them out without * Money, and the Statute 1 Jac. 1. cap. 25. par. 3. was cited, and that there was no other Statute concerning the Disposing and Provision for the Poor; and that neither of these Statutes gave such an arbitrary Power to the Justices of Peace as to Place an Apprentice on a Master without his Consent; and that it would be very inconvenient if Housekeepers should not have Liberty to choose their own Servants; for then a Thief, a Leper, or an Enemy might be imposed on them.

That the Resolutions of the Judges, as mentioned in Dalton, were not their Resolutions, as Justice Twisden often declared in his Life-Time, to which Justice Dolben now replied, that they were the Resolutions of the Judges, and good Law.

Those who argued for the Order very much relied upon the Judgment in that Case reported by * Raym. which was the very like Case now in Question; and Sir Bulstrode Whitlock's Annals fol. 16. was cited in Point, and that the constant Practice all over England, had been according to this Order.

Holt Chief Justice was against the Order, and was clear in Opinion, that the Justices of Peace had not such a Power.

But the other three Judges against him, upon this Difference, (viz.) that Justices of Peace cannot impose an Apprentice on any Tradesman against his Consent, but must

must assels and raise Money to bind him out; but that they had Power to impose an Apprentice in Husbandry at their Discretion, whether the Husbandman consented, or not.

However, because it was not set forth in this Order, that Fairfax was an Husbandman, or that the Apprentice was bound to Husbandry, so that it might appear he was not bound to any Trade; this Order was quashed.

Duppa versus Gerrard.

SIR Tho. Duppa, and others, Gentlemen Ushers, and daily Waiters to the King, brought an Assumpsit against the Defendant, in which they declared, that all Gentlemen Ushers, daily Waiters, &c. Time out of Mind, had used to have a Fee of 5 l. of every Person who voluntarily accepted the Honour of Knighthood; and that the Defendant (on such a Day) had voluntarily accepted Knighthood, and thereupon became indebted to them in 5 l. and in Consideration thereof (on such a Day) had promised to pay the Money, which he had not performed.

Assumpsit lies for a Fee of 5 l. due from any Person who accepts to be knighted.

And upon a Demurrer to this Declaration, it was adjudged, that this Action would lie for this Duty, and thereupon the Plaintiffs had Judgment.

Chettle versus Lees. Trin. 1 Willi' & Mariae,
B. R. Rot. 107.

IN Trespass for Breaking his Close, &c. the Declaration was of Easter-Term last past, which began on the 17th Day of April, and the Trespass was laid to be done in October before, (viz. in the 4th Year of K. James II.) per quod he lost the Profits of his Lands to the 1st Day of May ensuing (which was after the Beginning of Easter-Term) to which the Declaration did relate, as it appears supra, so that the Per quod did extend to a Time after the Commencement of the Action; and the Declaration was concluded contra pacem nuper Dom. Regis & Dom. Regis nunc, &c.

4 Mod. 6.
S. C.
Where the Conclusion of Plea contra pacem is meer Surplusage.

The Defendant pleaded a frivolous Bar, to which the Plaintiff demurred; and it was insisted for the Defendant, that the Declaration was ill, for that the Plaintiff had declared for Damages unto a Time after the Action commenced,

ced, which ought not to be, and had concluded his Declaration ill; for it should be contra pacem nuper Domini Regis only, there being no Continuando of any Trespass laid in the Time of the present King; and so is the Case 2 Cro. 377. in Point.

Econtra for the Plaintiff.

On the other Side it was said, that the Default in the Per quod, and also the Conclusion of the Declaration, (viz.) contra pacem Domini Regis nunc, were Surplusage, and therefore shall not vitiate the Declaration. See 2 Cro. 377. in Point.

Holt Ch. Justice told the Defendant's Counsel, that they came too soon for the first Exception, because the Jury might cure that Fault by a separate Verdict, (viz.) quoad the Trespass in the Month of October to the 17th of April, they assess Damages to so much, and the Plaintiff might release the Residue; but if the Verdict had been general, this would have been a good Exception afterwards; and the Court held that Clause contra pacem Domini Regis nunc, merely Surplusage, and therefore shall not prejudice that Matter, which without it was sufficient.

The Plaintiff had Judgment, the Bar being frivolous.

Rawlinson *versus* Oriett and Benson. Pasch.
1 Will. & Mar. B. R. Rot. 281.

Trespass against Two, who both pleaded in Abatement another Action of Trespass depending against one alone.

Trespass, &c. against two Defendants, who both plead in Abatement of the Bill, for that the Plaintiff had another Bill of Trespass here depending, against the Defendant Benson alone, for the same Trespass; and so petit judicium of this Bill pending the other.

And upon a Demurrer to this Plea it was objected, that it was ill; for if 'tis any Plea, 'tis only for Benson, one of the Defendants, and not for both; and for this Purpose the Cases of Misnomer of one of the Defendants were cited, which cannot be pleaded by the other joint Defendants, because it abates the Writ quoad him who was misnamed, as it hath been often adjudged.

Econtra.

* Hob. 137.

250.

Winch Ent.

892, 893.

It was argued that the Plea was good and well pleaded, and shall abate the whole Bill; and for Authorities in Point, the Cases in the * Margin were cited.

And Justice Eyre cited a Case in Cro. Eliz. 667. which he held to be the same in Reason with the present Case,

only that was a Plea in Bar, and not in Abatement as this is.

Holt Ch. Justice dubitabat, but the other three Judges inclined, that the Plea was good as to both the Defendants.

Broad versus Piper.

PArson Piper libelled in the consistory Court of Exon. against one Broad for a Mortuary; and now it was moved for a Prohibition, upon suggesting the Statute 21 H. 8. cap. 6. concerning Mortuaries, alledging also, that there is no peculiar Custom within the Parish of, &c. to have Mortuaries; and that a Prohibition will lie in such Case. See Cro. Eliz. 151.

On the other Side, that the Plaintiff in this Prohibition came too late, because it was after Sentence given in the Spiritual Court; and as to the Matter in Law, it was argued, that a Prohibition would not lie in this Case, because a Mortuary is merely of Spiritual Cognisance, of which this Court hath no Jurisdiction; and for this Purpose the Cases in the * Margin were cited.

Moreover, a Prohibition shall not be granted after Sentence, except it appears that the Spiritual Court had no Jurisdiction of the Cause; nay, it will not lie after Sentence, where it would lie before; and for this Purpose the Cases likewise in the † Margin were cited.

The Court, upon the whole Matter, was doubtful, whether a Prohibition would lie for a Mortuary; therefore, for settling this Point, they advised the Defendant to accept of a Declaration upon the Prohibition; and thereupon to demur, that the Matter might be solemnly debated.

3 Mod. 268.
Prohibition
after Sen-
tence for a
Mortuary.

Econtra.
* Cro. Car.
237. Stat.
Articuli Cleri.
Stat. Circum-
spectis Agatis.
Rast. Ent.
484.
Sid. 263.

† 2 Roll. Abr.
318.
Hob. 79.

Coleman versus Sherwin.

IN Covenant, the Plaintiff declared, quod cum per quod-
dam scriptum factum tam sigillo ipsius (Sherwyn) quam
sigillis quorundam Edvardi Dover & Johannis Ensfeild si-
gillat. agreeat. fuit per & inter partes prædict. & testatum ex-
istit quod prædict. Sherwyn Dover & Ensfeild in conside-
ratione redditus reservat. dimississent concessissent & ad fir-
mam tradidissent & uterq; eorum dimississet, &c. such Lands
for seven Years, and the Plaintiff protestando, that he

1 Salk. 137.
S. C.
Shower 79.
S. C.
Where a Co-
venant in
Law shall be
joint, where
not.

Co. Ent. 111,
112.

had performed all the Covenants on his Part, &c. the Defendant had not performed any on his Part, & in factio dicit quod the Defendant Sherwyn and one Heyward, by his Command, after the Demise, entered on the Lands demised, and turned the Plaintiff out of Possession, & ulterius in factio dicit, that neither Sherwyn, Dover or Ensfeild, nec aliquis eorum fuerunt vel fuit seisit. de terris, &c. tempore dimissionis nec habuerunt nec aliquis eorum habuit any lawful Power to demise, &c. but that one William Ensfeild was seised in Fee of the Premises before the Lease made, &c.

The Defendant, after Oyer of the Deed (which was a Deed-Poll) pleaded thus: si. Protestando, that (the Defendant) did not enter into the Land demised, nor was possessed thereof, pro placito dicit, that Sherwyn, Dover and Ensfeild were seised in Fee, &c. at the Time of the Demise, and had lawful Power to make the Lease, ut supra, (viz.) apud D. &c. Absq; hoc, that Sherwyn & Heyward per ejus mandatum, after the Demise, &c. entered on the Lands, or turned the Plaintiff out of Possession, and absq; hoc, that the said William Ensfeild was seised in Fee of the aforesaid Lands, as the Plaintiff had declared, Et hoc paratus est verificare.

And upon a special Demurrer, for that the Defendant had traversed Matter not traversable;

* 1 Roll. Abr.
520.
Hob. Hol-
der v. Tay-
lour's Case.

Holt Ch. Justice, upon opening the Matter, said, that this Action was brought on a * Covenant in Law made by the Word Concessi; and it appears here, that the Demise was a joint Demise made by the Defendant to Sherwyn, Dover and Ensfeild, and therefore this Covenant implied by Law, ought regularly to be joint.

Curia.

Sed per Curiam: In such a particular Case as this is, where one of the Lessors had actually done Wrong by his Entry on the Lessee, without the Assent of the others; the Covenant in Law shall not be taken to be joint, so as to charge the other Lessors with this personal Wrong of their Companion; for 'tis unreasonable, that the Innocent should be punished with the Guilty; therefore as to that Breach, (viz) the Entry of Sherwyn, and turning the Plaintiff out of Possession, the Action is well brought against him alone.

But as to the Two other Breaches assigned in the Declaration, this Action of Covenant ought to be brought against the Lessors, for as to that Purpose the Covenant in Law is joint,

joint, and not several; for in such Case there is no particular personal Tort done by one more than the other; and if several Actions should be permitted in such Cases, the Plaintiff would recover Damages two or three Times for the same Thing.

Crosse versus Hunt. In C. B.

DE B T upon a Specialty for 200 l. which was to this Effect :

Where a Traverse upon a Travers shall be good.

It. That the Defendant did declare from his Heart before God, That he had taken the Plaintiff to be his Wife, as she had taken him for her Husband; and the more to confirm the said Plaintiff, that he had no design but to perform his promise aforesaid, he (the said Defendant) obliged himself by the same Deed to pay unto the Plaintiff 200 l. if he should happen to be so base as to be worse than his Word, and that if he did not pay it when demanded, she (the Plaintiff) should have good Right to sue and recover it by Law, &c.

The Breach assigned was, that she had tendered herself to marry the Defendant, but that he refused, and afterwards married another Woman, per quod actio accrevit, &c.

The Defendant pleaded, that he after the Making the aforesaid Writing obtulit se to marry the Plaintiff, and she refused, absq; hoc, that he refused to take her for his Wife before she had refused to take him for her Husband.

The Plaintiff replied, that she tendered her self to marry the Defendant, and he refused, absque hoc, that the Defendant offered himself to marry the Plaintiff, & hoc, &c.

And upon a Demurrer to this Replication, it was insisted for the Defendant, that the Traverse in it was ill, because she had traversed that which was the Inducement of the Traverse in the Bar; so that 'tis a Traverse upon a Traverse which the Law will not allow.

Besides the Words of this Deed are in presenti, and not executory, but declaratory of an Act executed.

On the other Side it was argued, that the Words in this Deed are sufficient to create a Contract; and that of the highest Nature, for God is called as a Witness to it; and these Words cannot import any other Sense, but only a Contract to marry the Plaintiff.

Contra for the Plaintiff.

That the Traverse in the Bar is ill, because 'tis too large, for the Defendant had traversed more than was alledged in the Declaration.

N. Absque hoc, That he had refused to take the Plaintiff for his Wife before she had refused to take him for her Husband; so that he intended to make this Circumstance of Time Parcel of the Issue; whereas there is no such Circumstance alledged in the Declaration, nor any Affirmation, that the Defendant had refused before the Plaintiff had refused; and therefore because the Traverse in the Bar was idle and frivolous, the Plaintiff might well traverse the Substance of the Matter of the Bar; and of this Opinion was the Court as well to the Pleading, as to the Matter in Law.

Judgment for the Plaintiff.

Smith *versus* Pierce. Trin. 3 Jac. II. B. R.
Rot. 1160.

Where a
Term for
Years shall
be barred by
a Fine,
where not.

IN a Special Verdict in Ejectment the Case was thus;
N. The Jury find that Robert Basket was seised in Fee of the Lands now in Question; and by his last Will he devised the same to six Trustees for 99 Years, to the Intent and Purpose to pay all his Debts and Legacies; which being paid, then to remain to his Brother John Basket in Tail; *Provido* that if the said John, or his Heirs Males should take upon them to pay the said Debts and Legacies, or secure them to be paid, that then upon the Tender of 10 s. to the said Trustees they should assign all their Interest, &c. to him.

The Testator died, and John Basket entered with the Assent of all the Trustees, and sold Parcel of the Lands, and with the Money paid all the Debts and Legacies, excepting 18 l. Legacy still unpaid, and never demanded.

Afterwards the said John Basket made a Lease of the Lands severally to distinct Tenants, and during these Under-Leases, the said John Basket and his Wife by Indenture covenanted to levy a Fine of the Premises to the Use of himself for Life, then to the Use of his Wife for Life, then to his right Heirs for ever; and afterwards a Fine was levied accordingly; then John Basket died seised, and his Wife survived, and entered, and was seised, and so continued for eight Years, and then she died.

They find that there was not any Entry or Claim made by the Trustees, during the Lives of John Basket and his Wife, and that Elizabeth the Wife of the Defendant Peirce is the Daughter and Heir of the said John Basket, and that she entered, and that afterwards the surviving Trustees entered on her, and assigned their Interest to one Adams who is the Lessor of the Plaintiff.

Those who argued for the Plaintiff made this single Question, (viz.) Whether the Term for 99 Years was barred by this Fine and Nonclaim; and thereupon the only disputable Point was, whether this Term was divested or displaced by the Entry of John Basket the Devisee in Remainder, or by any other Act, Matter or Thing by him done or permitted to be done after his Entry; for if the Estate of this Term was not turned to a Right at the Time of the Fine levied, it must be admitted, that the Fine was no Bar, as it was adjudged in the Cases in the * Margin.

For the Plaintiff.

* 9 Rep. 104.
in Margaret
Podger's Case.
10 Rep. 96.
Seymour's
Case.

And it was argued that the Entry of John Basket was not such an Entry, which would displace the Term, &c. because the Jury found that it was with the Consent of all the Trustees of the Term; and an Entry by the Consent of the Parties makes a Tenancy at Will, and if so, then John Basket by his Entry became Tenant at Will to the Trustees.

That the Mortgagee is Tenant at Will to the Mortgagee paying the Interest, and tho' he makes Under-Leases, or a Settlement upon the Marriage of his Son, and thereupon levies a Fine, and the five Years pass without any Claim; yet if he continue to pay the Interest, this Fine shall not affect the Mortgagee.

Sid. 460.

The Cases in the † Margin were likewise cited to prove that an Entry (where the Assent of the Parties appears) makes only a Tenancy at Will, and not a Disseisin, but only at the * Election of the Lessor, and not of the Lessee at Will.

† Cro. Car.
302.
W. Jones 315.
Litt. sect. 70.
* Dyer 61,
62, 173.
2 Roll. Rep.
285.

Now the Bargain and Sale of Parcel, &c. made by John Basket, ut supra, divested nothing, because such a Conveyance consists only in Contract, and nothing more passes but what the Bargainor had a Right to sell; then as to the Making the Under-Leases, nothing is divested thereby, because there appears to be no ill Intent in John Basket; and 'tis the Intent of the Parties that makes the Tort, and if the making these Under-Leases should be taken

ken

ken to be a Devesting, then the Under-Tenants will be Tort-forsors nolens volens.

1 Leon. 121.

Lateh. 23,

57.

1 Roll. Abr.

661.

Litt. sect.

588. 3 Rep. 77. Farmer's Case. 2 Bulst. 138, 139. Sid. 458.

Moreover, he who enters on Lands and claims nothing but for Years is not a Disseisor, but at the Election of the right Owner, and not at the Election of him who made the Entry.

Contra for
the Defen-
dant.

It was argued for the Defendant, that this Fine was a Bar to the Term both within the Words and the Intention of the Statute 4 H. 7. and also upon the Authority of several Cases adjudged upon that Statute, out of which there are but three Savings.

1. First where the Party who had a Right to Claim, is under any Incapacity as a Feme-Covert, or an Infant, &c.

(2.) Where the Fine is levied by Fraud, &c. & partes finis nil habuerunt.

(3.) Where the Estate was not turned to a Right at the Time of the Fine levied.

But there are none of these Circumstances in the principal Case, for quoad the Incapacity, &c. 'tis not pretended but that John Basket was capable, &c. then quoad the Jury having not found any Fraud, none shall be intended, for *fraus non est presumenda*.

And as to the Estate being not turned into a Right, it was argued, that a Fine is in Nature of a Feoffment on Record; and 'tis to all Purposes equivalent to a Feoffment, and therefore this Fine had transferred as well the Estate at Will as the Remainder; for a Fine cannot operate by Fractions to bar one Estate, and not another of the same Cognisor, and of the same Lands.

Moreover, if nothing which the said John Basket had done in his Life-Time, shall be taken as a Disseisin, so as to devest this Term; yet it would be very strange if the Entry of his Widow who came in as a Purchaser, and claimed the Freehold, and enjoy'd it for her Life, if this should not be a Displacing the Term; for if it should not, the Term can never be displaced; but if the Entry of the Widow turned the Term to * a Right, then the Law is clear for the Defendant, because the five Years Nonclaim passed in her Life-Time, as 'tis expressly found by the Jury.

* Cro. Car.

78.

Sid. 458,

459.

Freeman's

Case in

Point.

Holt

Holt Ch. Justice. Where a Term is attending on an Inheritance, and the Lessor or Purchaser levies or accepts a Fine of the Lands, the Trustees of the Term are thereby barred, and can never afterwards claim any Thing; but yet the Term is not so barred, but that puisne Incumbrances may be let in upon the Purchaser; for a Fine shall bar no Estates but those which were intended by the Parties to be barred.

Adjournatur.

D E

Term. Sanct. Hill.

Anno 2 Willi' & Mariæ, B. R.

Whitehall *versus* Squire. Trin. 4 Jac. II. B. R.
Rot. 664

IN a special Verdict in Trover, the Case was thus:
H. One Matthews died Intestate in London, and the Defendant Squire being related to him, and hearing of his Death, requested the Plaintiff to provide for his Funeral, and that he (the Defendant) would reimburse him.

The Plaintiff, in Pursuance of the said Request, buried the Intestate Matthews; and it was found by a Jury, that the reasonable Charges of the Funeral was 23 l. afterwards

2 Mod. 276.

S. C.

1 Salk. 295.

S. C.

In Trover, what shall be a Conversion, what not.

wards the Plaintiff and the Defendant came to an Account, and Squire, the Defendant, delivered a Gelding to the Plaintiff, which was the Horse of the Intestate Matthews, and this was to be in Satisfaction of Part of the Charges, which the Plaintiff accepted as such; but afterwards he administered to the said Intestate, and brought an Action of Trover against Squire, for the aforesaid Gelding so delivered and accepted, as aforesaid.

And the Question was, Whether this Sale and Delivery of the Horse was a Conversion, or not.

Holt Ch. Justice held, that this Action of Trover was good, for all that can be objected against it is, that the Plaintiff was Particeps criminis, but that makes no Difference; for 'tis clear, that if a Stranger, who is a third Person, had taken out Letters of Administration, the Action would lie against the Defendant by such an Administrator, notwithstanding all the Dealings between Whitehall and Squire; and there is no Reason that this Case should differ, because now the Plaintiff is as a third Person, and being Administrator, he sues, and shall recover in the Right of the Intestate.

And he held it for Law, that where Trover is brought by a rightful Executor or Administrator against an Executor de son tort, he cannot plead Payment of Debts, &c. to the Value, &c. or that he hath given the Goods, &c. in Satisfaction of the Debts; because no Man ought to obtrude himself upon the Office of another; nevertheless, upon the general Issue pleaded, such Payments shall be recouped in Damages, as where the Disseisor hath paid the chief Rent, &c. that shall be recouped to him in the Damages in Assise brought against him by the Disseesee.

But in an Action by a Creditor against an Executor de son tort, the Defendant may plead Plene administravit, and give in Evidence the Payment of just Debts, but he cannot retain a just Debt to himself.

Two other Judges were of a contrary Opinion in the principal Case, (viz.) that the Plaintiff cannot maintain this Action, because 'tis directly against his own Agreement and Contract, and the Plaintiff himself is Particeps criminis, if any Thing is done amiss; wherefore 'tis not reasonable that he should be allowed to bring an Action against the Defendant, for doing a Thing to which he not only consented, but jointly acted therein with the Defendant; for he

did no more but only deliver the horse, and the Plaintiff accepted and received, and still retains it.

Judgment for the Defendant.

Panton *versus* Tertenants of Hall. Trin. 1 Will.
& Mar. B. R. Rot. 130.

Thomas Panton obtained a Judgment, Trin. 17 Car. 2. in B. R. against Benedict and John Hall, for 1500 l. and 4 l. 16 s. Damages; afterwards, (viz.) Anno 1 Jac. 2. Benedict Hall died, and before Execution executed, Thomas Panton died Intestate, and Dorothy Panton (the Plaintiff) administered and brought a Sci. fa. against the Heir and Tertenants of Benedict Hall, to have Execution of the Judgment, which Sci. fa. was directed to the Sheriffs of London, and returnable in mense Paschæ, 4 Jac. 2. upon which a Nihil was returned.

2 Salk. 598. Where the Judgment is joint against Two, and one of them dies before Execution, the Sci. fa. ought to be joint against both.

Whereupon a Testatum, that Benedict Hall had an Heir and Tertenants in the Countie of Gloucester and Bucks, two several Sci. fa's were sued out, one directed to the Sheriff of G. and the other to the Sheriff of B. and both returnable die Veneris prox. post tres Trinitatis.

The Sheriff of Gloucester returned Henry Hall, the Heir of Benedict Hall, warned, and also A. B. C. D. tenentibus omnium terrarum & tenementorum prædicti Benedicti in E. F. G. H. in Balliva sua die quo judicium reddit. fuit aut aliquo tempore postea.

Nota the Generality of this Return quoad the Parcels of the Lands: And see in Co. Ent. 621. a Herne 326. 2 Brownl. pl. 392. the like Return good.

The Sheriff of Bucks returned, that he warned A. Tertenant of such Lands, &c. in particular, &c.

Some of the Tertenants appeared by T. C. their Attorney, * & defend. vim & injuriam, &c. & petunt judicium de brevibus de Sci. fa. prædict. for that it was not commanded the Sheriff of Gloucester, by either of the said Writs to warn the said John Hall therein mentioned, unde pet. quod brevibus prædict. cassentur, &c. The like Plea by A. the Tertenant in Bucks.

* This is not formal upon a Sci. fa. quod nota.

The Plaintiff replied, that per aliqua præallegat. &c. brevibus prædicta cassari non debent, for that at another Time, (viz.) on such a Day in Michaelmas-Term, anno 4 Jac. 2. the Plaintiff prosecuted a Writ of Sci. fa. upon the aforesaid Judgment against the said John Hall, and afterwards an Alias Sci. fa. &c. and two Nihils were returned, &c. whereupon the Plaintiff had Judgment to have Execution against

Co. Ent. 620.

* Cessat Ex-
ecutio quoad
terras, &c.
quousq;

Nota the
Conclusion
of the Plea
and of the
Replication,
for they dif-
fer, and are
not apt the
one for the
other.

† Bro. Exe-
cution 10.
34 H. 6. 33.
Fitz. Execu-
tion 22, 39,
259.
15 H. 7. 6.
1 Roll. Abr.
888.
Allen 21.

* Fitz. Exe-
cution 78,
100, 106.

Lib. 3.

See Co. Ent.
619. b.

Entra for
the Plaintiff.

* Yelv. 208.

against him by Default, sed quod * cessat emanatio execu-
tionis inde quoad terras & tenementa ipsius Johan. Hall in
ea parte habend. quousq; pl'itum inter ipsam (the Plaintiff)
& hered. & terrarum tenen. prædicti Benedicti terminaretur,
and that thereupon the Plaintiff prayed a Writ of Sci. fa. a-
gainst the Heir and Certenants of the said Benedict, & ei
concedebatur, &c. prout per Recordum, &c. plenius appa-
ret & hoc, &c. unde petit iudicium & quod (the Defen-
dants) ad prædicta brevia de Sci. fa. ulterius respondeant &
proferat hic in Curia literas administrationis.

And upon a general Demurrer to this Replication, it
was argued for the Defendant, that this Writ ought to be
quashed, because it was not awarded against John Hall, the
surviving Cognisee of the Judgment who ought to be join-
ed with the Defendants, for the Judgment and the original
Writ or Process was joint, and therefore the Execution
ought also to be joint, for all Executions ought to pursue
the Nature of the Original; and the Cases in the † Margin
were cited, that the Sci. fa. in this Case ought to be joint.

Moreover, the Sci. fa. in this Case ought to be awarded
against Benedict Hall and John Hall; and upon the Return
thereof by the Sheriff, &c. that Benedict was dead, and that
John nichil habet, &c. then the Plaintiff might well have a
Sci. fa. against the Heir and Certenants of Benedict Hall
alone, for the Return of the first Writ of Sci. fa. had shewn
sufficient Matter of Severance of the Process; and to war-
rant this Course of Proceeding, the Case in the * Margin
was cited.

Then the following Exceptions were taken against the
Return of the Sheriff of Gloucester, (viz.) That by such a
general Return the Tenants would be concluded to say,
that such a One is Tenant of another Parcel of the Land,
and not summoned; and so the Law would be subverted,
which directs that all the Tenants should be equally
charg'd, as 'tis adjudged in Sir William Herbert's Case.

Besides, there are no negative Words in this Return,
(viz. Et sunt nullæ aliæ terræ vel tenementa) but this last
Exception was over-ruled.

It was argued on the other Side for the Plaintiff, that
the Law was clear, that all the personal Charge shall sur-
vive against John Hall alone, which was agreed on all
Sides (tho' the Authorities in the * Margin are quite con-
trary); but in Raym. 26. it was held, that all the Perso-
nalty survives; and so is Sir William Herbert's Case, and
2 Saund. 50. and at Common Law no Execution was to be

be against the Realty, and the Statute which gave the Elegit did not bar the prior Remedy at Common Law upon the Personalty; and where a Judgment is had against one who dies before Execution, a Sci. fa. will not lie against his Heir and Certenants until a Nichil is returned against his Executor, and so are the Cases in the * Margin.

* 7 H. 4.

46 Ed. 3. 29. b. 19 Ric. 2. 163. Bro. Stat. Mer. 43. 17 Ed. 2. 139. 24 Ed. 3. 28. 18 Ed. 3. 142. 33 Ed. 3. 162. 7 Ric. 2. 46. But Dyer 207. Reg. Jud. 57. b. contra. 1 Lev. 30.

And here the Personalty surviving, the Remedy to recover it must survive, and it was never yet seen, that a Sci. fa. issued to charge the Lands of any Man distinct from the Personalty; therefore in this Case the Sci. fa. against John Hall was to revive the Judgment, for which Purpose it was not necessary or proper to join the Certenants of Benedict Hall; but the Judgment being now revived, this Sci. fa. against his Certenants is now proper.

And as to the Exceptions to the Return, the Cases in the * Margin were cited.

* Co. Ent.

621, 622.

Hern 326. 2 Brownl. Placito 392.

But the Court held that the Return made by the Sheriff of Gloucester, was insufficient for the Reasons supra; they held likewise, that the Sci. fa. ought to be joint against John Hall the Survivor, and also against the Heir and Certenants of Benedict Hall, because the Judgment was joint, &c.

And Holt Chief Justice said, this was a judicial Writ, and might be framed upon the Subject Matter, and the Form he proposed was thus:

It. That the Writ should be against John Hall, to shew Cause why the Plaintiff should not have Execution against him de Bonis & catallis, and of the Moiety of his Lands, and against the Heir and Certenants of Benedict Hall, to shew cause why (the Plaintiff) should not have Execution of the Moiety of the Lands of the said Benedict Hall, without mentioning any Goods; quod nota.

And the Writ supra was quashed.

Lambert *versus* Thurston. Hill. 2 W. & M.
B. R. Rot. 686.

3 Mod. 275

Trespass *vi*
& *armis* may
be brought
in B. R.
where the
Damages are
laid under
40s. but not
Trespass ge-
nerally.

* 6 E. 1. c. 8.

2 Inst. 315.

14 H. 8. 15.

* 2 Inst. 311.

IN Trespass by Writ of Original, the Plaintiff declared in this form.

ff. T. S. attachiatus fuit ad respondendum C. L. de placito transgressionis & unde idem C. per W. W. attorn' suum queritur quod prædict' T. S. (on such a Day, &c.) vi & armis clauum suum apud H. fregit, &c. and concluded ad damnum ipsius C. 20 s.

And upon a general Demurrer to the Declaration, it was objected, that it appears upon the very face of the Record, that this Court hath no Jurisdiction of the Cause; for 'tis expressly enacted by the Statute of * Gloucester, that the Superior Courts shall not hold Plea of any Trespass under the Value of 40 s.

To which it was answered, that this was an Action of Trespass, *vi & armis*, of which no inferior Court can hold Plea, and so is the Opinion of my Lord * Coke expressly; and therefore the Writ of Trespass in the Statute of Gloucester must be intended a Trespass without Force, of which this Court cannot hold Plea unless the Damages are above 40 s. but if Trespasses *vi & armis* are not punishable here when the Damages are under 40 s. they would be punished no where; for it appears, that such Trespasses with Force are not maintainable in an inferior Court, because a Fine cannot be assised there, for which Reason this Exception was disallowed.

(2.) The second Exception was, that the Declaration was ill, because the Action was not brought by Bill, but by Original; and the original Writ was not set forth at large in the Declaration, as it ought, for 'tis the common Course in the Court of C. B. where they always proceed by way of Original; and in this Court likewise when the Action is by Writ, and the Plaintiff in his Declaration had generally set forth, that the Defendant *Attachiatus fuit ad respondendum (to the Plaintiff) de placito transgressionis super Casum* without saying more; this is ill.

To which it was answered, that this Objection had been often made, and as often over-ruled, and held that this summary Way of declaring, &c. in Trespals upon an Original, is good.

Thereupon Judgment was given for the Plaintiff; quod nota.

Cotton versus Johnson.

IN this Case the Cause of Action appeared by the Declaration to arise in Ely, which is a County Palatine, and that the Cause was tried in Cambridgeshire; and after a Verdict, &c. it was moved in Arrest of Judgment, that this was a Mistrial.

But per Curiam * Ely is not a County Palatine, but only a Royal Franchise; and therefore the Defendant cannot plead to the Jurisdiction of this Court, (viz.) that the Lands, &c. of the Cause of Action are, or did arise in Ely, for that is only particular to a County Palatine which Ely is not; for the Bishop of Ely can only demand Cognisance of Pleas, which is all the Franchise he hath as to this Purpose.

And such are the Franchises of the Cinque Ports which are the same with this of Ely; and 'tis usual for Appeals of Murder to be brought in this Court when the fact was committed in either of these Franchises, and the Trials here concerning Lands in Ely are good; but 'tis not so where the Lands lie in a County Palatine.

It was held also in this Case, that tho' the Jury ought to have been de Vicineto de Ely, and the Trial was in Cambridgeshire where the Bill was brought, this Jeofaile was helped by * the Statute.

The Plaintiff had Judgment.

1 Salk. 183.
S. C.
Ely is not a County Palatine, but Royal Franchise.

* 2 Inst. 223.
9 H. 7. 12.
4 Inst. 244.

Jeofaile cured by the Statute.

* 16 & 17
Car. 2. c. 8.

Swift *versus* Heath. Hill. 2 Jac. II. B. R. Rot.
1189.

UPON a special Verdict the Case appeared to be as followeth:

ff. A

Where he who had the Reversion in Tail expectant upon the Death of Tenant for Life, made a Feoffment by the Consent of Tenant for Life; this is no Discontinuance, because he had no Freehold.

¶ A. had Issue B. and being seised of Lands, &c. to him, and to his Wife, and to the Heirs of the Body of A. Remainder over, &c. he and his Wife join in a Lease for Years not warranted by the Statute, &c. then A. died, and D. his Widow married again; then B. the Issue of A. who was but sixteen Years old, and who had the Reversion in Tail after the Death of the Wife, made a Feoffment with Livery by his own Hands to the Lessee for Years in Possession, by and with the Consent of the Husband and Wife, Tenant for Life, &c. and the Question was, whether this Feoffment and Livery made by B. as aforesaid, (who had only the Reversion in Tail expectant upon the Determination of the Estate for Life, and made by and with the Consent of Tenant for Life, who had the immediate Reversion,) did work any Discontinuance of the Remainder over, &c. under which the Plaintiff claimed.

Curia.

And per Curiam, it was no Discontinuance of the Remainder over, because B. who made the Feoffment had only a Reversion in Tail expectant upon an Estate for Life, and so no Freehold in him at the Time he made this Feoffment; and 'tis a Maxim in Law, that he who hath no Freehold in the Land cannot by any Means discontinue the Estates therein, and for this Purpose the Cases in the * Margin were cited.

* Owen 66.
Rol. Abr. Tit.
Feoffment 661.
Dyer 231.
18 Ed. 4. 2.
Perk. sect.
615.

But then it was insisted, that the Verdict expressly found that the Husband and Wife who were Tenants for Life, and had the Freehold in them, or one of them, did consent to the making this Feoffment, which express Consent shall amount in Law to a Surrender of their Estate to him in Reversion; and if so, then B. had the Freehold in him by such Surrender, and by Consequence this Feoffment made by him after he had the Freehold, is a Discontinuance.

Curia.

To which it was answered, and so resolved by the Court, that this naked Consent of the Tenant for Life, that B. should make the Feoffment, did not amount to a Surrender of the Estate for Life; wherefore it was adjudged, that the Feoffment made no Discontinuance, and thereupon the Plaintiff had Judgment.

Where Infancy was pleaded, and the Plaintiff replied, that it was for Necessaries generally, such Replication is good.

Huggins *versus* Wiseman.

A **A**ssumpsit for Labour and Medicines in curing the Defendant of a Distemper, &c. who pleaded *infra statem viginti & unius Annorum*; the Plaintiff replied it was for Necessaries generally; and upon a Demurrer to this

Repli.

Replication it was objected, that the Plaintiff had not assigned in certain, how, or in what Manner the Medicines were necessary; but it was adjudged, that the Replication in this general Form was good.

The Plaintiff had Judgment.

D E

Term. Paschæ.

2 Will. & Mariæ B. R.

The Earl of Pembroke's Case.

PHILIP Earl of Pembroke being Tenant in Tail of several Manors and Lands in Wales, suffered a Common Recovery thereof in the Grand Sessions there, by which he barred all the Remainders over, &c. and died, leaving Issue only one Daughter, now an Infant.

The present Earl, to whom these Manors and Lands would have remained (if no Recovery had been suffered) brought a Writ of Error to reverse the Recovery, and sued out a Sci. fa. against him, who was the nominal Demandant in the Writ of Entry, &c. upon which this Recovery was suffered, who was returned summoned, &c. and the Plaintiff assigned Errors, and the Defendant pleads In nullo est erratum; all which was entered.

Upon a Writ of Error to reverse a Common Recovery, there must be a Scire facias against the Tertenants.

And

And now it was moved in Behalf of the Infant Daughter, that the Plaintiff might be compelled to sue out a Sci. fa. against the Certenants as well as against the Demondant; and that it was necessary for him so to do, because the Certenants ought not to be put out of Possession without any Warning to defend themselves, for they may have a Release to plead; and for this Purpose the Cases in the * Margin were cited; and a Case was cited in this Court between Juxon and Booth, where the Proceedings in a like Writ of Error were set aside for Want of a Sci. fa. against the Certenants.

* Dyer 311.
Cro. El. 739.
Bridgm. 69.
Moor 524.
Co. Ent. 233.
b. in the Case
of a Fine.

Reontra.

On the other Side it was said, that the Awarding a Sci. fa. in such Cases was only discretionary, and not stricti juris; and so it was held in this Court in † Wynn and Lloyd's Case; but the Circumstance of the present Case is extraordinary, for this Infant Daughter is the Certenant of all the Lands; wherefore if a Sci. fa. goes out against the Certenants, she will be returned Certenant, &c. and thereupon they on the other Side will enter the Prayer that the Parol may demur during her Nonage, which will greatly delay the Plaintiff, for this Infant may die, and the Lands may remain to another Infant; wherefore the Discretion of the Court in this Case will incline for the Plaintiff.

† Sid. 213.
Raym. 16.
55, 70, 96.
1 Lev. 146.

And farther it was offered by the Counsel for the Plaintiff to consent, that the Infant should be admitted to plead what she thought fit, so as she would come in and take no Advantage of her Infancy.

Holt Ch. Justice. The Granting a Sci. fa. in such Cases against the Certenants is discretionary, and not stricti Juris; but yet it hath been the constant Course of this Court to grant it, therefore he was of Opinion not to depart from that which had been the usual Course of the Court; tho' it was admitted by all, that this was an extraordinary Case, for they all knew how this Recovery had been contrived by the late Lord Chancellor Jefferies, whose Son married this Infant, and who now claims under this Recovery.

* Co. Ent.
233. b.

But the Court awarded a Sci. fa. against the Certenants, quod nota, like Law in Error to reverse a * Fine.

Drake *versus* Cooper & al'.

TRespass quare vi & armis, the Defendants entered his Close containing 100 Acres, &c. (in which a Fair, Time out of Mind, had been kept on Michaelmas-Day) & adtunc & ibidem fregerunt & divulser' divers Booths, &c. ibidem erect. by the Plaintiff, for exposing Wares and Merchandises to Sale there, brought by Persons thither resorting, nec non eo quod (these Defendants) adtunc & ibidem impediverunt & disturbaverunt the Plaintiff in erecting other new Booths, &c. for the Sale of Merchandise, by Reason whereof the Plaintiff lost all the Profits of Piccage and Stallage.

Where several and distinct Things may be joined in one Declaration.

Upon Not guilty pleaded, the Plaintiff had a Verdict, and now it was objected in Arrest of Judgment against the Declaration, that the latter Part thereof, (viz.) The Disturbance in Building new Booths sounds altogether in Case and not in Trespass, and therefore 'tis incompatible with the first Part of the Declaration, which is Trespass vi & armis; for these several Matters require several Judgments against the Defendants, (viz.) the first is a Capiatur, but the last is only a Misericordia, and therefore cannot be joined in one Declaration.

Sed per Curiam non allocatur; for the Disturbance, &c. is laid only in Consequence of the first Trespass, &c. and 'tis of the same Effect as a Per quod in a Declaration, which is often used in Actions of Trespass vi & armis, to let in the consequential Damages, &c. and one Plea goes to the Whole; for if the Defendant had pleaded a License from the Plaintiff to enter the Close, that would have been a good Justification of the Trespass; quod nota.

Judgment for the Plaintiff.

Venables *versus* Dasse.

UPON a Motion in Arrest of Judgment, for that this Action was brought by Bill, and the Entry on the Record, &c. was with a general Memorandum: *scilicet* Memorandum quod alias scilicet Term. Sanct. Mich. And the Plaintiff declared, that the Defendant falso & malitiose on such a Day, &c. indicted the Plaintiff for keeping a Bawdy-house, upon which Indictment he (the Plaintiff) was arraigned

Where the Cause of Action did arise after the Term began.

raligned and tried, &c. Et inde legitimo modo acquietatus, (viz.) on such a Day at the Sessions held in the Old Baily, &c. which Day of Acquittal was by the Plaintiff's own shewing after Michaelmas-Term began, of which Term the Bill was :

So that this Action was brought before the Cause of Action accreted, for the Bill and the Declaration relate to the first Day of Michaelmas-Term, and the Acquittal, which was the Cause of this Action, or at least the Consummation of that Cause appears to be on a subsequent Day in that Term; therefore if the Plaintiff would have maintained his Action for this Matter arising within the same Term, the Entry ought to be with a Special Memorandum, (viz.) Quod alias scilicet die Veneris (or any other Day) prox. post tres septimanas Sanct. * Michaelis, as the Case should require, so that the Cause of Action might appear to be before the Action brought.

* Or Mensis Michaelis.

Recontra.

To which it was answered by the Plaintiff's Counsel, that the Verdict had cured this Fault; for after a Verdict the Court will intend and take the Bill to have Relation to the last Day of the Term, and not to the first, ut Res magis valeat.

Curia.

But the Court was another Opinion, (viz.) that the Bill and the Declaration were ill for this Fault; for it appears that the Plaintiff had no Cause of Action on the first Day of Michaelmas-Term, to which Day the Declaration must necessarily relate; for the Term is in Law but as * one Day.

† Sid. 373, 432 contra.

* 2 Cro. 384.

† Hill. 27 Car. 2. Rot. 1591. 2 Lev. 141.

And Holt Ch. Justice cited a Case between † Hutchinson and Thomas, in the Time of Hale Ch. Justice, where, after Verdict it appeared, that the Cause of Action accreted on a Day after the Term began, in which the Action was brought; and the Bill was of the Term, with a general Memorandum, as in this Case; and it was adjudged, that the Bill did relate to the first Day of the Term, and therefore that Judgment was arrested; and so it was in the principal Case; but it hath been held good if Bill was filed after the Term began.

2 Lev. 13, 176. Sid. 432.

The King *versus* Inhabitants of the Hermitage.

Where 'tis not necessary to set forth what Estate a Man hath.

UPON a Writ on the Statute of Westm. 2. for improving Commons, and against throwing down Enclosures, it was returned, Qui dicunt super sacram. suum quod

quod prædict' T. S. (in the Inquisition named) 1 die Augusti anno 3 Jac. 2 & semper postea hucusque intereff. fuit & adhuc intereff. existit pro remanere cujusdem Termini 31. annorum adtunc & adhuc ventur' & inexpirat' de & in quodam vasto sive Communia communiter vocat' *Permage Common*, continen' per estimationem 300 Acres scituat' jacen' & existen' in paroch' de H. in Com' prædict' parcel' maner' de F. in eodem Com' ac etiam parcel' ducatus Cornub' Quodque ipse idem T. S. sic ut prefertur interesse existen' postea, videl't, (on such a Day) prædictum vastum sive Commun' cum sepib' fossatis & repagul' inclusit & quod postea (viz. on such a Day) malefactores ignoti sepes, &c. diruper', &c.

The Exception taken to this finding of the Jury, and the Return of the Inquisition was, for that they find and return, that T. S. intereff. fuit & existit in the said Waste of Common for a Term of Thirty-one Years, adtunc & adtunc ventur' & inexpirat'; which is too general and incertain, because it doth not appear what Right of Estate the said T. S. had in the said Waste; for the Statute hath these Words, (viz.) He who hath Right to improve; and for ought appears to the contrary the said T. S. might have only a Right to the *Perbage* of this Waste; or he may be only a Commoner, and so might have no Right to enclose; and so not within this Statute.

To which it was answered, and so resolved per Curiam, that ex vi termini the Words import, that T. S. had an Interest in the Land of this Waste, and not in the *Perbage* alone.

And Holt Chief Justice held, that he who had only the *Perbage* might enclose, therefore this Return was held * good; for that it was not necessary to set forth what Estate the Party had.

Keilw.

159. B.

* Cro. Car.

280, 440,

580.

In these Cases the Estate of the Party is not set forth.

Meredith *versus* Allen. Hill. 2 Willi. B. R.

Rot. 20.

DEBT upon a Bond for 300l. the Defendant prayed Oyer of the Condition which was thus, ff. If the Ship called the Crown of London, do and shall sail from the River Thames to Bourdeaux in France, thence to Genoa, thence to any Part of the Straights without Deviation, (the Dangers of the Seas excepted) and from thence

1 Salk. 138.

S. C.

Where the Breach of a Condition, need not be assigned.

return

Q 2

return directly to the said River Thames before the End of 15 Months, &c. and the Defendant do and shall pay to the Plaintiff 180l. within 20 Days after the Return of the said Ship, into the said River Thames, or at the Expiration of 15 Months, which shall first and next happen; or if the said Ship shall be inevitably lost in the said Voyage, then the Bond to be void.

Then he pleaded, that the Ship sailed to Alexandria in the Straights, and in her Return home, she was cast away, and drowned.

The Plaintiff replied, that she was not cast away or drowned modo & forma & hoc petit qd inquirat p patriam.

To the Replication, the Defendant demurred specially, and shewed for Cause, that the Plaintiff had not assigned any Breach of the Condition in his Replication; and therefore it was insisted, that it was ill, for that very Reason, like the common Case of Debt upon Bond, for Performance of an Award, the Defendant pleads no Award made; the Plaintiff cannot join Issue upon such Plea without shewing an Award, and a Breach thereof, by which the Plaintiff may be entitled to this Action; and for an Authority in Point the Case in the * Margin was cited, which was Debt on a Bond with the like Condition as in the principal Case, and there it was adjudged, that the Plaintiff must assign a Breach in his Replication.

But the Court was of a contrary Opinion, for they held that the Replication in the Case at Bar was sufficient without assigning any Breach of the Condition therein; that they of their own Knowledge were satisfied; that the Case of Hayman and Gerrard was not Law, nor taken to be so at the Bar at the Time when the Judgment in that Case was given.

And moreover, that the Assignment of the Breach of a Condition, &c. in the Replication was not necessary, but only in that single Case of Debt on a Bond for Performance of an Award.

Nota, The Plea in this Case was ill; sed per Curiam, if it had been good, the Replication likewise had been good without Assignment of any Breach; quod nota.

Murgatroid *versus* Law. Hill. 2 W. & M. B. R.
Rot. 126.

IN an Action on the Case for diverting a Water-course, the Plaintiff declared, quod 1 Junii an. 4 Jac. 2. & semper postea

* Hayman
vers. Ger-
rard.
1 Sand. 102.
now denied
to be Law.
Curia.

Yel. 24, 25.
78, 79.
3 Cro. 320.
1 Lev. 54, 55.
3 Lev. 17.

A Prescrip-
tion pleaded
against a
Prescription,
is not good
without a
Traverse.

postea hucusq; legitime seisit' fuisset & adhuc seisit' existit (in Right of his Wife) de & in quodam messuag' vocat' B. jacen' in M. in Com', &c. Cumq; quidem communis aquæ Cursus curren' a quodam loco vocat' T. in M. præd' in & trans quadam clausa vocat' Black Acre, & White Acre jacen', &c. in M. usq; ad messuagium præd' vocat' B. a tempore cujus memoria hominum non existit currere consuevit & adhuc currere debuit, by which the Plaintiff had great Benefit as well for watering his Cattle, as for the Use of his House, of which the Defendant non ignarus sed machinan' & fraudulententer intenden' to deprive the Plaintiff of the Profit of the Water, quoddam fossatum in clausis præd' fodit & fecit ejus prætextu tota Aqua & cursus Aquæ præd' a messuagio præd' diversa fuit & abinde hucusq; diversa existit per quod the Plaintiff had lost all the Profit, &c.

The Defendant pleaded in Bar, quod clausa præd' vocat' Black Acre & White Acre distant per magn' spacium, (viz.) per dimidium unius milliaris a messuagio præd' vocat' B. inter quæ quidem clausa & idem messuagium sunt separales terræ & tenementa diversor' personar' scituat' & jacen' per & trans quæ tenementa præd' aquæ cursus decurrere oportet antequam ad messuag' ill' advenire potest, and protestando, that in Summer-Time the said Water-course could not run to the said House by Reason of the Drought, pro placito dicit, that he is seised in Fee of the said two Closes; and that he and all those whose Estate he had therein, had Time out of Mind used ac legitime potuerunt adquare averia sua in eisdem clausis depascen' ex aqua aquæ cursus præd' ibidem; and also for the Conveniency of Watering, fossat' in clausis præd' effodere & facere quotiescunq; occasio fuit & pro eo (the Defendant) quoddam parvum fossatum juxta the Water-course in clausis prædict' for the convenient watering his Cattle in the said Closes, sicut occasio tunc fuit, &c. fecit, &c. prout licuit.

And upon a general Demurrer, this Plea was adjudged ill, because the Defendant had neither confessed and avoided nor traversed the Matter alledged in the Declaration, (viz) the Diverting the Water-course; so the Declaration was not answered.

Moreover, all the Substance and Colour of this Plea in Bar, is a Prescription to make a Ditch in his (the Defendant's) own Lands; and the Declaration is likewise founded on a Prescription, and one Prescription pleaded against another is not good without a Traverse.

But

But the Court held, that upon the general Issue pleaded, it had been proved, that the Water did not always run to the Plaintiff's House, but that it was usually dried up in the Summer, or drank up by the Cattle of the Defendant; in such Case the Plaintiff would have failed of his Prescription.

The Plaintiff had Judgment.

The Church-wardens of *Northampton's* Case.

Mandamus to swear two Church-wardens chosen by the Parishioners who of common Right are to make the Election.

MAndamus to swear two Church-wardens chosen by the Parishioners of the Parish of St. Giles, in the Town of Northampton; the Case was,

II. The Vicar of that Parish for the Time being, hath usually chosen one of the Church-wardens, but at this Time he was under a Deposition for not taking the Oaths to King William and Queen Mary, and the Church was vacant; whereupon the Parishioners proceeded to the Election of two Church-wardens, and presented them to be sworn; but the Register of the Consistory Court being a Friend to the Vicar, refused to swear them, unless that Person whom the late Vicar approved be nominated for one.

Hardres 378.

Holt Chief Justice. Of common Right, the Choosing Church-wardens belongs to the Parishioners; 'tis true in some Places, the Incumbent chooses one, but that is only by Usage; and the Canon concerning the choosing Church-wardens is not regarded by the Common Law; this was the Opinion of the Lord Chief Baron Hale, as may be seen in the Case cited in the Margin.

The Mandamus was granted.

Knight and Donning versus Cole & ux'. Mich.
1 Will. & Mariae B. R. Rot. 516.

3 Mod. 277.
3 Lev. 273.
Release by one as Executor, is no Bar to a Demand which he hath in his own Right.

THE Plaintiffs brought a Sci. fa. against Cole and his Wife, in which they set forth, that Sir John Knight, William Eyre, Esq; and John Knight, Esq; had lately in the Court of King's Bench, and in the Reign of King Charles II. recovered by Bill against one John Lawford, Esq; 6000 l. and 16 l. 3 s. 4 s. for Damages, and that afterwards Sir John Knight and William Eyre died; and
John

John Knight survived, who made his Will, and thereby constituted John Kent, Tho. Knight and William Donning, Executors, and died, the Debt and Damages upon the said Judgment not being satisfied, &c. that John Kent and the Plaintiffs proved the said Will; and afterwards John Kent died, and the Plaintiffs survived, and then the said John Lawford made his Will in Writing, and made the Wife of the Defendant Cole, his Executrix, and died, the Debt, &c. not being satisfied; that the Executrix proved Lawford's Will, per quod the Plaintiffs being the surviving Executors of John Knight, who was the surviving Recoveror, pray Execution against the Defendant Cole and his Wife, the Executrix of Lawford, the Recoveree, de bonis Testatoris, &c.

The Defendants appear and plead, that before the Exhibiting this Writ of Sci. fa. (viz. on such a Day) the said William Donning (one of the Plaintiffs) by his Deed of Release now produced, cognovit se habere recept. super diem dat. relaxationis prædict. de & ab præfat. Tho. Cole & Maria Uxore ejus executricis testi. & ult. voluntatis Johannis Lawford Ar. defunct. summam quinq; librarum existen. legatum, Anglice, a Legacy, dat. præfat. Willo. Donning per præfatum Johannem Lawford in & per Testamentum & ult. voluntatem suam & proinde prædict. W. Donning remisit & relaxavit præfat. Thomæ Cole & Mariæ Ux. ejus de & ab eodem legato, Anglice, Legacy, & de & ab omnibus actionibus factis & demandis quibuscunq; quæ prædict. W. Donning habuisset vel tunc habuit versus prædict. Tho. Cole & Mariam Uxorem ejus Executores & Administratores vel Executores vel Administratores prædict. Johannis Lawford defunct. pro aliquibus materia vel causa quibuscunq; a principio mundi usq; dat. ejusdem scripti Relaxationis unde petit Judicium si, &c.

And upon a general Demurrer to this Plea it was insisted for the Plaintiff, that it appears by this Release it self, that it only related to this Legacy of 5 l. the Words being, (viz.) Upon the Receipt of 5 l. Legacy; and it was never intended, that it should have so general an Operation as to discharge the Judgment; and several Cases were cited to prove, that general Words * subsequent, &c. in Covenants, &c. have been adjudged to be restrained by particular Words antecedent.

Moreover, It hath been adjudged of late, that where a particular Cause or a Consideration is mentioned in a Re-

For the
Plaintiff.

* Dyer 240,
255.
Hob. 275.

2 Roll. Abr.
409.
Herley 15.
Sid. 141.

lease,

2 Lev. 215.
3 Lev. 273.

Econtra for
the Defen-
dant.

2 Roll. Abr.
404.
Curia.

29 Ed. 3. 26.

1 Leon. 263.
3 Cro. 6.

1 Lev. 99,
100, 272.
Sid. 141.

lease, it shall restrain the general Words following, which are only Words of Course.

On the other Side, Alcham's Case, 8 Rep. was cited, and the Rule then taken was relied on, (viz.) That antecedent general Words shall be restrained by particular Words following, but not *econtra*; but if general Words follow particular Words, they shall be taken in the largest Sense, for otherwise the general Words would be insignificant and void; and the Words of a Deed ought not to be rejected and made useless, as long as they may be reduced to good Sense, and are not repugnant in themselves.

But it was resolved by the Court *seriatim*, that this Release was no Bar to this Suit; first, for that the Words are, All Actions, Suits and Demands which Donning had against the Defendants generally, but no Mention of releasing any Suit which he had in Right of his Executorship; therefore those Words shall not extend to any Demand he had in that Capacity, (viz.) As Executor, but only to such Demands which he had in his own Right; for if an Executor grants *Omnia bona sua*, the Goods which he had as Executor, will not pass, unless upon this Diversity, (viz.) where the Grantor had no other Goods but as Executor, for in such Case those Goods shall pass, *ut res valeat*.

So where a Manor is in the Hands of an Executor, and he grants all his Interest in the Manor, the Manor it self will pass.

Now in the principal Case, Donning released all Demands generally; but it appears, that he at that very Time had one Demand in his own Right, (viz.) the Legacy of 5 l. therefore nothing is released which he had as Executor; for 'tis in Reason the same with the Grant of *Omnia bona*, &c. *supra*.

Besides, the Intent of the Parties plainly appears to the contrary, the particular Consideration being mentioned; and the Intent is always to be observed, as well in Releases as in other Deeds.

For these Reasons the Plaintiff had Judgment.

The Defen-
dant pleaded
his Pardon
for a Mur-
der; it ought
not to be al-
lowed with-
out a Writ of
Allowance.

Cooke's Case.

THIS Cooke was outlawed for Murder, and brought a Writ of Error to reverse it, which being done, he was forthwith arraigned, and pleaded his Pardon under the Great

Great Seal, in which there was no Obstacle for his not finding Sureties for his Good Behaviour.

Holt Ch. Justice. The Pardon ought not to be allowed without a Writ of Allowance directed to the Judges of this Court out of Chancery, testifying that he hath found Sureties before the Coroner and Sheriff, &c. according to the * Statute, by which 'tis enacted, that he who hath a Pardon of Felony, shall within three Months after such Pardon, find Sureties before the Sheriff and Coroner, for the Good Behaviour, which shall within three Weeks after the three Months, be returned into the Chancery, under the Seals of the said Sheriff and Coroner; and if the Party give no such Security, the Pardon shall be void.

* 10 Ed. 3. c. 3. Westm. 2. Now repealed by the Statute 3 & 6 W. & M. cap. 13.

But by the other Judges, the Pardon ought now to be allowed without any Writ of Allowance, because the Party hath three Months given by the Statute, after the Pardon, to find Sureties, under the Penalty, that his Pardon shall be void, if he doth not do it.

Nota, That afterwards, in the same Term, the Writ of Allowance was brought into Court; and upon Prayer, &c. it was recorded under the Pardon.

Barnes *versus* Bulwer.

It was moved for a Superfedeas to a Writ of Error upon a Judgment in Ejectment, for that the Plaintiff in Error had not given his own † Recognizance to the Defendant, that if the Judgment is affirmed, &c. he will pay the Costs and Damages, &c.

Where the Plaintiff in Error need not give a Recognizance.

To which it was answered, that he (the Plaintiff in Error) had found two sufficient Men to be his Bail, who were bound in a Recognizance, &c. by which the Intent, tho' not the Letter of this Statute, was satisfied; and the Party himself lives in the remote Parts of this Kingdom.

† 16 & 17 Car. 2. c. 3.

The Court held, that the Intent of this Statute was for the Security of the Party Defendant in the Writ of Error, which Intent is hereby fully observed, because the Bail already given is better than his own Recognizance; and this hath been the constant Practice of all the Courts, &c. ever since the Statute was made, because of the Inconvenience of the Parties coming from remote Parts.

The Superfedeas was allowed.

Where an
Infant is Ex-
ecutor alone,
he cannot
sue per Attor-
natum.

Showers Rep.

S. C.

Salk. 105.

S. C.

4 Mod. 7.

S. C.

2 Cro. 441,

442.

3 Cro. 321,

341.

* 1 Roll. Abr.

288.

3 Cro. 377,

424.

2 Saund. 213,

213.

22 H. 6. 31.

F. N. B. 27.

2 Inst. 261.

2 Cro. 303.

Bridgm. 73,

74.

† 3 Cro. 5.

321.

3 Bulst. 108.

Style 318.

Exontra.

Coan *versus* Bowles & al'. Pas. 4 Jac. II. B. R.
Rot. 521.

Replevin in C. B. against A. B. and C. they all per T. S. attorney. *suum vch. & defend. vim & injuriam, &c.* and made Conscience by Bailiffs to I. N. Damage-tenant; and at the Trial the Plaintiff was nonsuit, and the Defendants had Judgment *de return. habend'*.

Thereupon a Writ of Error was brought, and the Error assigned was, for that A. one of the Defendants, was an Infant, and yet had appeared and pleaded by Attorney.

To which it was answered, that this was not reason-ous, because Judgment was given for the Infant, which is for his Benefit; and also in this Case the Defendants made Conscience in their droht, and all three of them make but one Bailiff; 'tis like the Case where an Infant and one of full Age are made Executors; in such Case the Infant, with the other Executors, may sue * per Attornatum, be-cause 'tis in the Right of another. Adjournatur.

At another Day it was argued, that an Infant can ne-ver appear per Attornatum, nor in propria persona sua, but always per Guardianum or Prochein Amy; neither can an Infant be an Attorney for another, 1 H. 5. 6. and if he is made Executor, he ought to sue per † Guardia-num, as may appear by the Cases cited in the Mar-gin, all which are against the Opinion in 2 Saund. 213.

It was granted on the other Side, that if the Infant in this Case, and the others, was merely Defendant, his Appearance by Attorney had been Error; but it was in-sisted, that this being in Replevin, the Adowants are in Nature of Plaintiffs, and this for three Reasons:

1. They are called Actors, which is a Term in the Ci-vil Law, and signifies Plaintiffs.
2. They shall have Judgment *de return. habend.* and Damages as Plaintiffs.
3. The Plaintiff might plead in Abatement of the A-dowry, therefore 'tis in Nature of an Action.

Besides, as to this Point, there is no Difference between Executors and Bailiffs, for both act in the Right of an-other; and it hath been adjudged, that where an * Infant

Executor

Executoꝝ is Plaintiff, he may sue with other Executors per Attornatum; and by the same Reason the Bailiffs in this Case may sue per Attornatum, tho' one of them is an Infant.

Holt Chief Justice. Where an Infant is Executor alone, Curia he cannot sue per Attornatum, for if he do, he shall be amerced pro falso clamore; but where he is joined with others of full Age, 'tis otherwise; because those of full Age have Authority to dispose all their Assets without the Assent of the Infant; and this is the Reason of the Difference between an Infant Plaintiff and Defendant, in 2 Sand. 212. * 48 Ed. 3. 10 b. 1 Roll. Abr. 782. 3 H. 4. 6. and 'tis a good Rule, that where any Matter may be pleaded in * Abatement, it shall never be assigned for Error, and in this Case the Plaintiff in Replevin might have pleaded Infancy in Abatement of the Cognisance.

At another Day, (viz.) in Michaelmas-Term, 2 W. & M. this Case was argued seriatim by the Bench; and they all agreed, that the Judgment should be affirmed, but upon different Reasons, three of the Judges being for the Affirmance, because the Defendants are in auter Droit, and they all make but as one Bailiff; and that the Disability of the Servant shall not prejudice the Master, and they agreed, that the Case of * Executors is the same in Reason with the present Case; they agreed likewise, that there is a Difference where the Infant is Plaintiff, and where he is Defendant; and that an Avowant is in Nature of a Plaintiff, and so are the Bailiffs who make Conusance, &c. and in the 1. Inst. it was doubted whether an Avowant was such a Defendant as was within the Statute for Payment of Costs, because he is esteemed to be a Plaintiff; and that where an Infant is sole Executor, he cannot sue per Attornatum; to which Holt Chief Justice agreed; but if such an Infant Executor recover per Attornatum, his Appearance is no Error, but 'tis otherwise where he is condemned in the Action; and one of the Judges was of Opinion, that this Matter might be assigned for * Error, tho' it was pleadable in Abatement of the Conusance. * 1 Roll. Abr. 288. 3 Cro. 378. 2 Cro. 441. † 1 Inst. 303. 1 Cro. 504. * 2 Cro. 5. 1 Roll. Abr. 781, 783.

But Holt Chief Justice held, that this Appearance of the Infant was irregular, for he ought to plead per guardianum, and the Joining the other Defendants with him, signified nothing so as to charge the Infant; for if the Judgment pass against him, it shall be for the Damages de bonis propriis, and he shall be amerced; therefore where he is joined, or where he is single, there is no manner of

Difference in Reason, for in both Cases the Loss is the same, if Judgment is against him.

The Case of several Executors where one is an Infant, is founded upon another Reason, (viz.) upon Necessity; for 'tis absolutely necessary, that all who are appointed Executors by the Will, should be made Parties to the Action; and where there are several Executors, the Act of one shall conclude his Companion; and therefore the general Appearance per Attornatum is good for all of them; and he denied, that the Reason was, because they were in autor Droit.

And that in this Case, the Infant was not compellable to be joined with the other, for he might have been fevered; so the Reason is not the same.

*Tis a Rule, that what may be assigned for Error shall never be pleaded in Abatement. 17 E. 1. 70. b. 48 Ed. 3. 10. b. Cro. El. 853, 141. Bude *versus* Starkey. 1 Roll. Abr. 782.

And he laid down this to be a general Rule, (viz.) that a Man shall never assign that for Error which he might plead in Abatement; for it shall be accounted his folly to neglect the Time of taking that Exception; therefore if a Feme Covert bring an Action in her own Name per Attornatum; and the Defendant pleads in Bar to the Action, he shall never afterwards assign the Coverture for Error; therefore since the Plaintiff in this Case was estopped by his own Admission to assign the Infancy for Error, he held that the Judgment ought to be affirmed.

Rawlins versus Vincent. Hill. 2 W. & M. B. R. Rot. 793.

Breach of Covenant where 'tis well assigned in the Words of the Indenture.

DE B T upon Bond for Performance of Covenants in an Indenture, in which amongst other Things the Defendant covenanted, that Nicholas Barbone his Executors or Assigns should, on or before the 25th Day of September next following, make out a good Title in Law and Equity, to the Satisfaction of the said William Rawlins, his Heirs or Assigns, or to his or their Counsel learned in the Law, in and to several Messuages, &c. situate in Eagle-Street in the Parish of St. Andrew, Holborn, and to every of them with their Appurtenances, and to the Fee-simple, and the Inheritance thereof, that then, &c. then he pleaded, that Nicholas Barbone was living, and that he the Defendant had performed all the Covenants on his Part to be performed, &c.

The

The Plaintiff replied, and shewed the Breach in the Negative, in the very Words of the Indenture, (viz.) that the said Nicholas Barbone upon or before the 25th Day of September, &c. nec ad aliquod tempus postea hucusque non demonstravit bonum titulum in lege & equitate ad satisfactionem prædicti Willi' Rawlins vel ejus consilii in & ad separalia messuagia prædicta nec alicui eorum cum pertin' nec ad feodum vel hereditatem eorundem.

The Defendant rejoins, that the said William Rawlins a tempore confectionis Indenturæ prædictæ hucusque pacifice a quiete habuit & tenuit & gavisus fuit prædicta messuagia, &c. without any lawful Disturbance or Disturbance by any Person whatsoever, discharged of all Incumbrances.

And upon a general Demurrer to this Rejoinder, two Things were resolved; first, that the Rejoinder was ill, because it was no Answer to the Breach assigned in the Replication.

(2.) That the Replication was good, and the Breach of Covenant well assigned; for the Words of the Indenture were pursued, tho' it was objected, that the Words of the Covenant were in the Disjunctive, (viz.) to satisfy the Plaintiff, or his Counsel; and therefore it was objected, that the Plaintiff ought to shew, that such a one [was his Counsel, of which the Defendant had Notice, &c. and then shew the Breach, for not satisfying him, nor his Counsel, for (as it was said) that the Defendant had his Election, whether to satisfy the Plaintiff, or his Counsel; but that he could not satisfy the Counsel before he knew who he was.

To which it was answered, and so resolved by the Court, that all this Matter ought to come on the Part of the Defendant in his Rejoinder, &c. if the Truth had been so, for prima facie the Breach being assigned in the very Words of the Indenture, such an Assignment is good.

The Plaintiff had Judgment.

1 Mod. 223.

Bisse versus Harcourt. 3 Mod. 280. a Case between the same Parties, but to another Purpose, which see postea.

An Attorney or Officer of B. R. hath no Privilege to alter a Venue where he is Defendant, *aliter* where he is Plaintiff.

MR. Harcourt, the Secondary of the Crown Office, was Defendant in two Actions brought against him, and laid in the proper Counties where the Cause of Action did arise; and it was now moved to alter the Venue, and that the Trial might be in Middlesex, by Reason of the Defendant's Privilege, he being one of the Clerks of B. R. and his Attendance necessary and requisite here; and a Rule made in Andrew Loder's Case was now produced, who being one of the Clerks of this Office, had this Privilege allowed.

But the Court denied the Motion in the principal Case, because Harcourt was the Defendant in those Actions; and that an Attorney or Officer of the Court where he is Defendant hath no Privilege concerning the Venue; but where he is Plaintiff, he hath the Privilege to lay his Action in Middlesex, and out of the proper County; and the Venue shall not be charged upon the Common Affidavit by Reason of his Privilege; and Justice Dolben remembered a Cause where the Venue was altered upon Affidavit, tho' an Attorney was Plaintiff; because the Matter did arise, and all the Witnesses lived in remote Parts of the Kingdom.

Kellow versus Rowden. Trin. 2 Jac. II. B. R. Rot. 796.

3 Mod. 253.
S. C.
3 Lev. 286.
S. C.
Reversion expectant on an Estate Tail, is not Assets to charge the Heir.

THE Case, H. W. Kellow Executor of E. Kellow, brought an Action of Debt on a Bond against Richard Rowden, the Son and Heir of John Rowden the Elder, his Father; and declared upon a Bond of 120l. made by the Father of the Defendant, to the Testator of the Plaintiff.

The Defendant pleaded Riens per descent de prædicto Johanne Rowden patre suo on the Day of the Writ purchased, nor at any Time afterwards, upon which they were at Issue.

And the Jury found a special Verdict to this Effect:

It. That John Rowden, the Father of the Obligor, had Issue Charles Rowden his eldest Son, and Richard Rowden the Defendant, his second Son; and that he (the Father) was seised in Fee of an House and ten Acres of Land, which he settled by Deed, to the Use of himself for Life, Remainder to his eldest Son Charles Rowden in Tail, Remainder to his own right Heirs, and died; that Charles Rowden was seised in Tail, with a Remainder in Fee expectant, &c. and that he had Issue one John Rowden, and died; and that he the said John Rowden, the Grandson, was seised, ut supra, and afterwards died without Issue, after whose Death the Premises descended to the Defendant Richard Rowden, in Fee, as Heir to the said John Rowden the Grandson, and also Heir of John Rowden the Obligor, by Virtue whereof he entered and was seised, &c. on the Day of the Writ, &c.

The sole Doubt upon this special Verdict was, Whether upon the Matter thus found the Declaration was good, or not, because the Plaintiff had declared against the Defendant as immediate Heir of the Obligor, without mentioning the intermediate Descents.

And it was argued, that this Declaration ought to have been special, shewing how the Defendant became Heir to the Obligor; for here the Defendant took the Lands as immediate Heir to John Rowden the Grandson, and his Nephew, and as mediate Heir to the Obligor; and therefore the mediate Descents ought to be set forth in the Declaration, to charge the Defendant with this Debt; and for Authorities in this Point, the Cases in the * Margin were cited, and Jenks's Case in Point.

Dyer 366. a. W. Jones 462. Cro. Car. 151. Jenks's Case in Point. Dyer 308, 368. 40 Ed. 3. 10. Plowd. 441. Broke Descent 14, 30. 1 Cro. 412. W. Jones 361. Regist. 240. b. 2 Cro. 161. 3 Cro. 24. 1 Cro. 543. Dyer 9. 1 Inst. 239. b.

* F.N.B. 220.

2 Roll. Abr.

400, 709.

3 Cro. 24.

On the other Side it was argued, that there was a great Difference between Jenks's Case and this; for in Jenks's Case, the Lands descended in Fee-simple in Possession to the Son of the Obligor, who afterwards died without Issue, and then the Lands descended to the Defendant in that Action, as Uncle and Heir to his Nephew; but in this Case the Brother and Nephew were seised of the Fee-simple only in Reversion, expectant upon the Determination of the Estate-tail, and not of any Fee-simple in Possession; and this Reversion was not Assets in their Hands, by which Charles or John Rowden his Son, might be charged with this Debt;

Escontra for the Plaintiff.

* 3 Cro. 350. Debt; and for this Purpose the Cases in the * Margin
6 Rep. 42. were cited.
in Mildmay's
Case, and 58. b. in Brediman's Case.

This Case was compared to that of *possessio fratris*, &c. where the Father had a Son and a Daughter by one Nenter, and a Son by another Nenter, and made a Lease for Life, or Gift in Tail, and died; and afterwards, during the Continuance of either of those Estates, the Son by the first Nenter died; in such Case, the Son by the second
1 Inst. 14, 15. Nenter, and not the Daughter by the first, shall inherit, because her Brother had no actual Seisin of the Inheritance.

And this Case was now put, (viz.) If Lands descend to an Heir, who dies before any actual Entry made, by Reason whereof the Lands descend to another Heir; those Lands shall not be recovered in Value by a Warranty made of other Lands by the first Heir, because he had only a Seisin in Law, as 'tis expressly proved 1 Inst. 239.

Nota; per Holt Ch. Justice, this last Case was denied to be Law. Then the Counsel for the Plaintiff proceeded, (viz.) That the Issue in this Case was, Whether the Defendant had Assets by Descent from the Obligor; and 'tis proved by the Verdict that he had; and it appears likewise that he had no Assets charged with this Debt of his Brother, nor of his Nephew, for neither of them ever had any Assets chargeable; and if they had no Assets, then by Consequence the Defendant could not have any Assets from them.

For the
Plaintiff.

Upon this first Argument, the Court inclining for the Defendant, it was argued again for the Plaintiff, that it was a Principle in Law, that every one who claims Lands as Heir, ought to make himself Heir to him who was last seised, therefore if the Defendant in this Case had demanded these Lands, he ought to have made himself Heir to his Father, and not to his Nephew, because he was not actually seised of the Fee-simple, for he had only the Reversion, which by his Death would have been extinct and gone. And the Defendant had a Fee-simple in Possession, which his Nephew and Brother never had, therefore he had nothing by Descent from them; and it was agreed, that if the Defendant's Nephew had been actually seised of the Fee-simple (as in Jenks's Case) the Declaration ought to have been Special.

For the Defendant it was said, that the Brother and Nephew had such a Seisin of the Reversion that they might alien or charge it after the Determination of the Estate-tail; moreover, that if Debt should be brought against an Heir, who had nothing but a Reversion in Fee expectant upon the Determination of an Estate-tail, in such Case the usual Course is to plead specially, (viz.) That he had nothing præter ut supra, and thereupon the Plaintiff might pray and have Judgment cum acciderit.

But per Holt Ch. Justice: The Declaration is good, and thereupon the Plaintiff had Judgment against the Opinion of Justice Eyres; but it was agreed by all, that a Reversion expectant upon an Estate-tail is not Assets to charge the Debt upon the general Issue Riens per Descend. Curia.

But by Holt Ch. Justice: A Reversion expectant upon the Determination of an Estate for Life, is quasi Assets, and ought to be pleaded specially by the Heir; and the Plaintiff in such Case may take Judgment of it cum acciderit; quod nota.

Brunetti *versus* Lewen. Trin. 4 Jac. II. B. R.
Rot. 185.

THE Case, ff. Abraham Henriques Valentini, residing in Leghorn in Italy, drew four Bills of Exchange, all of the same Date, and for one and the same Sum of Money, the Second to be paid if the First was not, and so on, according to the Custom of Merchants, and all directed to James Abendano, to pay to Francis Brunetti (the Plaintiff) 500 Pieces of Eight, at Usance, &c.

The first Bill was presented to Abendano, who refused to accept it, whereupon that Bill was protested before a Notary Publick, for Non-payment, according to Custom, &c.

Thereupon the Defendant Lewin having Notice of the Protest, he, for the Honour of Abraham Henriques, the Drawer, subscribed a Note, by which he undertook the Payment of the Money on the Day of the Bills returned, if not paid by Abendano.

Upon which Brunetti (the Plaintiff) endorsed this second Bill for Value received, unto Alvarez de Costa, and he in like Manner to Manuel de Vega, and he to Angelo Rezzinico,

nico, and he to Jacob Argas, and he to Jeranimo Parenzi, all for Value received.

At the Day of the Return, Abendano still refused to accept the Bills; whereupon another Protest was made on the second Bill so endorsed, as aforesaid, by the Persons before mentioned.

Thereupon Peter Antonio Brunetti and Lucas Antonio Brunetti hearing of this last Protest, pay the Money pro Honore of Francis Brunetti (the first Endorser) but doth not say that he paid it to Jeranimo Parenzi, the last Endorsee; and of all this Matter, Lewin the Defendant had Notice, who had subscribed, &c. pro honore of Abraham Henriques, the Drawer, and so he became chargeable to the Plaintiff for so much, for whose Honour the Money was paid, and who stands liable for so much to his Friend, who paid it, and this by the Custom of Merchants; and for Non-payment this special Assumpsit was brought, setting forth all the said Matter.

Upon Non Assumpsit pleaded, the Plaintiff had a Verdict and Judgment, and thereupon a Writ of Error was brought in the Exchequer Chamber, and there the only Error insisted on was, for that the Declaration did not set forth in certain, to whom Peter Antonio Brunetti and Lucas Antonio Brunetti had paid the Money; for 'tis only said generally, that they solverent the aforesaid 500 Pieces of Eight, but not to whom in particular; and so it might be paid to another, and not to Parenzi, the last Endorsee, to whom alone it was due; and if so, the Defendant still remains liable to him.

Curia.

Sed per Curiam: After a Verdict, as in this Case, it shall be intended, that the Money was paid to the right Party, especially since 'tis said to be paid ex parte of the Plaintiff, which could not be, if it had been paid to a Stranger; wherefore the Judgment was affirmed.

Nota: The same Exception was taken in B. R. in Arrest of Judgment, but disallowed; whereupon this Writ of Error was brought.

The Judgment affirmed.

Nightingale *and* Fowles *versus* Bridges. Mich.
1 W. & M. Rol. 397.

IN Trover the Plaintiffs declared, quod cum (they on such a Day) possessionat' fuerunt de bonis & catallis sequen', (viz.) de una nave vocat' the James Frigat, oneris 130 Doliorum & de decem bombardis Anglice Guns, cum omnibus Armamentis apparat' torment' funibus municon' provision' sclopis limbis & al' suppediment' eidem navi spectan' sive pertinen', &c.

Where insensible Words shall be helped by a Verdict.

Upon Not guilty pleaded, the Plaintiff had a Verdict and Damages; and it was now moved in Arrest of Judgment, for that the Declaration is too general, and altogether incertain of what Nature the Goods and Chattels were; and therefore it was impossible for the Defendant to make any direct Answer to it, or to know to what Matter he should make Defence at the Trial; and thereupon Judgment was stayed till next Term.

Afterwards in Trinity-Term another Objection was made to the Declaration, for that the Plaintiff had declared inter alia, that he was possessed de Quingent' ponder' librat' of such a Commodity, &c. whereas ponder' librat' is insensible, for Pondus is Latin for a Weight, and librat' is weighed, and for this the Cases in the Margin were cited in Point.

2 Roll. Abr. 247.
Latch. 216.
Curia.

But the Plaintiff had Judgment; for as to the first Objection the Declaration is certain enough, for the whole Sentence is restrained by the last Words, eidem navi spectan', and it would be endless to set forth every Particular in a Ship; and as to the second Exception, that the Words were insensible, 'tis helped by the Verdict, and the Damages shall be intended to be given for that which is well laid.

2 Cro. 669.
Cro. Car. 33.
Stiles 338.
Sid. 98, 263.

The Earl of Salisbury's Case.

HE was brought from the Tower by Habeas Corpus, and being at the Bar, his Case was thus:

1. He was by the Convention which was afterwards turned into a Parliament Anno 1 W. & M. impeached by the Commons for High Treason, for being reconciled to

A general Pardon must be pleaded with the usual Averments.

the Church of Rome, contrary to the Statute in that Case made and provided; and upon this Impeachment he was committed to the Tower by the House of Peers, and there continued till the Parliament was dissolved, and a new Parliament called, and now (after a long Sessions) adjourned for two Months.

The Counsel for the Earl moved, that he might be discharged upon the new Act of Oblivion which passed in the last Sessions of Parliament wherein neither his Crime nor his Person were excepted, but clearly within the Act of Pardon.

But per Curiam: Notice cannot be taken of this Act of Pardon, unless 'tis pleaded with the Averments, because there are several Exceptions in it both as to Crimes and Persons; therefore 'tis necessary that the Party who would have the Benefit thereof, should aver himself by Plea capable of such Benefit; and not excepted therein, as 'tis ruled in Plowden, and other Books; and here the Lord at the Bar cannot plead this Pardon, because there is nothing before the * Court, upon which to Ground such Plea.

Plowd. 484.

b 401.

8 Rep. 68.

4 H. 7. 8.

Rast. Ent.

665. a.

* But *quare* whether he might not plead it in Discharge of the Matter returned by the Habeas Corpus, and enter it as the same Roll.

Then it was moved, that he might be bailed, and for that purpose the Lord Danby's Case was cited, who was bailed, tho' committed by the Peers in Parliament, as in this Case; and the Earl of Shaftsbury's Case was likewise mentioned.

Sed per curiam: The E. of Salisbury was not bailed, because there was a very short Adjournment of the present Parliament, and that is the proper Place for him to make Application to be bailed.

A Commitment by the House of Peers; the Person shall not be bailed, tho' the Parliament is dissolved.

That the chief Reason for bailing the Lord Danby was, because the then Parliament were prorogued, and the Time incertain for their Meeting again; and so no Prospect of an Opportunity to apply himself that Day, besides he was denied to be bailed by several Judges of the Court of B. R. until the Chief Justice Jefferies came in.

And the Court cited the L. Stafford's Case, who was committed by the House of Peers, and notwithstanding that Parliament was dissolved by which he was committed; yet he was continued a Prisoner, and afterwards tried upon the same Impeachment, convicted and executed, which fully proves, that Commitments by the Peers in Parliament, are not made

made void by the Prorogation or Dissolution of the same Parliament.

Besides, the Lord Danby was bailed to appear at the next Sessions of Parliament, which was an Affirmance of the Commitment, and a plain Proof of the Opinion of the Court at that Time, that the Commitment was not avoided or discharged by the Prorogation of the Parliament.

And for these Reasons the Lord Salisbury was remanded to the Tower.

Nota: Per Ch. Justice Holt, in an Argument upon pleading a Tender, (viz.) that where a Tender and Refusal is pleaded either on a single Bill, or other simple Specialty, the Defendant need not conclude in Bar to the Action, but only in Discharge of the Damages; for in this Case the Tender is not a Discharge to the Action, or to the Payment of the Money which is still due notwithstanding the Tender; for that is only to excuse the Damages.

Of Pleading
a Tender.

But where Tender and Refusal is pleaded in an Action for a Penalty on a Bond with a Condition to pay a lesser Sum, there the Defendant must conclude in Bar to the Action; because a Tender of a less Sum on the Day had discharged the Penalty; and therefore 'tis a good Bar to the Action brought for the Penalty; quod nota.

Nota also, that in both the said Cases the Pleader ought to conclude with a profert hic in Curia.

Mordant *versus* Thorold. Hill. 2. W. & M.
B. R. Rot. 340.

THE Case, *fl.* Anna Maria Thorold, Widow in the Reign of Jac. 2. obtained a Judgment in Dower in C. B. against Sir John Thorold; and this was for a third Part of several Manors, Messuages, Lands, Tenements and Hereditaments in Lincolnshire; upon which Judgment Sir John Thorold brought a Writ of Error in B. R. where it was affirmed; and then Anna Maria, &c. died intestate, and Administration of her Goods, &c. was granted to the Plaintiff Mordant.

3 Lev. 275.
S. C.
1 Salk. 252.
S. C.
Sci' fa'
brought by
an Admini-
strator on a
Judgment in
Dower, &c.

Afterwards the said Mordant as Administrator, &c. brought a *Sci' fa'* in B. R. reciting this Matter; and that the said Sir John Thorold might *hew Cause quare* (the Plaintiff) non habet tant' denarios quant' media proficua præd' tertiæ partis maneriorum, &c. quant' damna per aliquid vastum in eisdem tertiis partibus commissa post primum judicium

* No Execution shall be stayed by a Writ of

Error after Verdict and Judgment in *Dower*, unless the Plaintiff in Error become bound to the Defendant to pay Damages and Costs of Suit, if the Judgment is affirmed, 16 & 17 Car. 2. cap. 8.

cium præd' reddit' & ante affirmationem judicii illius se extendunt & mis. & custagia occasione præd' Brevis de Errore corrigend' apposit' juxta formam * statuti in hujusmodi casu inde edit' & provis', &c.

The Defendant pleaded, that nulli denarii adjudicat' fuerunt præfat' Annæ Mariæ in vita sua pro mediis proficuis præd' tertiæ partis maneriorum, &c. vel pro mediis proficuis alicujus inde parcell' nec aliqua damna pro aliquo vasto in eisdem tertiis partibus commissi. nec aliqua missi. vel custagia occasione præd' Brevis de Errore corrigend' & hoc parat' est verificare, &c. unde petit judicium si executio, &c. of any Money for any such mean Profits, or any Damage for any Waste, or of any Costs. habere debeat.

For the Plaintiff.

And upon a general Demurrer to this Plea, it was afterwards argued in Trinity-Term for the Plaintiff, that this Statute was made to remedy the Mischief, (viz.) that the Demandants in Dower, notwithstanding that they had got Judgment, were delay'd of Execution, and by that Means lost the Profits of the Lands, tho' the Judgment was affirmed, which was a very great Encouragement to the Tenants in Dower to bring Writs of Error without any manner of Cause.

Now for the Prevention thereof, it was enacted by this Statute, That the Plaintiff in Error should enter into a Recognisance to answer for the mean Profits, &c. which Recognisance creates a certain Duty, though incertain as to the Quantum, and vests as a Duty eo instanti that he entered into the Recognisance, and this to the Demandant in the Action; and if so, then by Consequence it shall come to the Executors or Administrators as other Duties do; and here the Administrator took a proper Course to ascertain this Duty, (viz.) in the first Place to revive the Judgment by Sci. fa. and after he had got Judgment to have Execution for so much as the mean Profits amounted unto, then to prosecute a Writ of Inquiry of the Quantum; and after the Inquisition was returned, and the Duty ascertained, then to execute the Recognisance, which Recognisance is in Nature of a Covenant to answer the mean Profits; and therefore the Death of the Party shall not frustrate its Effect.

On

On the other Side it was argued for the Defendant, For the Defendant. that the Taking the mean Profits after the first Judgment, was a personal Tort, and in Nature of a Trespass, & actio personalis moritur cum persona: And here is a Sci. fa. brought by an Administrator, where there was no Judgment for any Damages given to the Intestate, which is a Thing never seen before.

There is a Case in * Sid. where the Demandant in Dower had Judgment by Default, and a Writ of Inquiry of Damages, and then a Writ of Error was brought, pending which Writ the Tenant in the first Action died; and in a Sci. fa. against his Heir to have Execution of the Damages, it was adjudged against the Plaintiff in the Sci. fa. because at that very Time when the Tenant died, the Judgment was compleat only as to the Lands, but not to the Damages; and this Case was upon the Statute of † Merton, which gives Damages, (viz.) The Value of her Dower from her Husband's Death to the Time of Recovery of her Dower; and as to this Matter, there is no Difference between a Sci. fa. for Damages upon the Statute of Merton, and upon the Statute 16, 17 Car. 2. for in both Cases the Judgment quoad the Damages, ought to be compleat in the Life-time of the Parties.

And the Court was of that Opinion.

And Holt Ch. Justice gave another Reason, (viz.) That the Judgment which was given in this Case was altogether in the Realty, and an Administrator cannot have Execution of any Judgment, but only in the Personality. Curia.

Judgment quod querens nil capiat.

Giles *versus* Hooper. Hill. 2 Will. & Mar.
B. R. Rot.

THE Case, si. Lease for Years, rendring 80 l. per Annum Rent, free and clear from all Manner of Taxes, Charges and Impositions whatsoever.

Adjudged (absente Holt Ch. Justice) that the Renter made a Covenant, and that the Words above-mentioned extend to discharge the Lessor from Payment of all Land-Taxes lately imposed by Act of Parliament, and long after the Commencement of this Lease; and that the Lessee is bound to pay the whole Rent, without any Manner of Deduction for any old or new Charge or Imposition whatsoever.

Lease for Years, rendring Rent, free of all Taxes, the Word Renter makes a Covenant, and the Lessor is discharged from all Taxes.

Rottenhoffer

Plea in Abatement,
not good.
Mich. 3 W.
the like Judgment between
Greenvill v. Dighton, upon the like
Plea.
See Dyer 32. a.
3 Cro. 537.
1 Mod. Rep. 121.
Sid. 236.
2 Vent. 261.

Rottenhoffer versus Lenthall the Marshall. Pas.
2 Will. & Mar. B. R. Rot. 355.

AN Action of Debt upon Escape brought against the Marshal, in which the Plaintiff had a Verdict and Judgment; and in an Action of Debt brought upon that Judgment, the Defendant pleaded, that he brought a Writ of Error on the same adhuc dependen. & indiscuss. and concluded in Abatement, (viz.) Si respondere compelli debeat, &c.

And upon a general Demurrer to this Plea, it was adjudged ill; so the Defendant was ruled to answer over.

Hall versus Wybourn. Mich. 1 Will. & Mar.
B. R. Rot. 671.

3 Mod. 311.
S. C.
2 Salk. 420.
S. C.
Plea of the
Statute of
Limitations,
where good,
where not.

THE Case, ff. Assumpsit for Wares sold, &c. The Defendant pleaded Non Assumpsit infra sex annos.

The Plaintiff replied, that he (the Defendant) tempore promission. & assumptionis in narratione prædict. superius specificat. fuit commorans & residen. in partibus ultra mare scilicet apud Guinea extra Angliam & extra ligeantiam Domini Regis & Dominae Reginae nunc, & ibidem continuavit usq; (such a Day) &c. quo die & non antea & post. promission. & assumption. prædict. (the Defendant) voluntarie rediit & retornavit in hoc regnum (viz.) apud L. in parochia & Warda prædict. quodq; prædicta Billa ipsius (the Plaintiff) exhibita fuit versus præfat. (the Defendant) pro prædicta causa actionis in eadem Billa specificat. infra unum Annum prox. post prædict. reditum ipsius (the Defendant) in Anglia scil't prædicto Termino Sanctæ Trin. &c.

* 21 Jac. 1.
cap. 16.

And upon a general Demurrer to this Replication, the only Doubt was, Whether the Statute of * Limitations was a good Bar to this Action, the Defendant being beyond Sea for all that Time; and it was argued that it should, because the Plaintiff had neglected his proper Remedy by not filing an Original, and prosecuting the Defendant to an Outlawry, which, tho' it shall be reversed after his Return; yet the Plaintiff might have brought another Original by Journies Accounts, and thereby take Advantage of his first Writ.

Also the Plaintiff might have sued out a Latitat, and continued it to the Time the Defendant returned, but he (the Plaintiff) had not done any Thing, and is therefore barred by the Statute; for 'tis clear he is not within any of the Savings thereof.

And a Case was cited in C. B. when Bridgman was Chief Justice, and it was between Sir Geo. Binion and Evelyn in Assumpsit for Wares sold, &c. the Defendant pleaded Non Assumpsit infra sex annos; the Plaintiff replied, that from the Time of the Promise, &c. to such a Day, the Defendant was a Member of Parliament, and then the Civil Wars began and continued till such a Day, and that he brought his Action within six Years after the War ended; and upon a Demurrer it was adjudged for the Defendant, and that the Replication was ill, because the Plaintiff ought to have filed an Original, which is no Breach of Privilege, tho' the Defendant was a Member of Parliament; Quod nota.

Filing an Original is no Breach of Privilege of Parliament.

It was insisted on the other Side for the Plaintiff, that if this Matter will not help him, then the Defendant will have Benefit by his own Laches, for he may stay beyond Sea as long as he will, and this Court hath no Jurisdiction over him till he returns; for tho' it may hold Plea for Matters done beyond Sea, yet that must be intended when the Defendant is within the Realm; for 'tis the Presence of the Party which gives Jurisdiction, and is the Occasion of the Suit.

For the Plaintiff.

Cro. Car.
245, 333.
W. Jones 251.

Besides, this Case is within the Equity of the Saving in the Statute, but the Defendant had Judgment; and in Pursuance of this Judgment it was held in the Case cited in the Margin, that where an Action was brought on a Bill of Exchange, and the Defendant pleaded Non Assumpsit infra sex annos; and the Plaintiff replied, that the Defendant was all that Time out of the Realm; this Replication was adjudged ill.

Chevely v.
Bond. Hill.
3 W. & M.
B. R. Rot.
307.

Judgment for the Defendant.

Bisse *versus* Harecourt. Hill. 1 Will. & Mar.
B. R. Rot. 217.

The Defendant concluded his Plea in Disability, and the Plaintiff his Replication in Bar; the Whole is discontinued.

ASSUMPSIT for 400 l. against Harecourt, the Secretary of the Crown-Office, who pleaded in Disability of the Plaintiff, (viz.) That before the Bill purchased, (viz.) on such a Day at Wells, in the County of Somerset, before

T

the

* It ought to
be *Et hoc, &c.*
per *Recordum,*
&c.

the Ch. Justice Jefferies, the Plaintiff was indicted for High Treason against King James II. and was convicted thereof upon his own Confession; and by the Judgment of the Justices was attainted, &c. and so he (the Defendant) demanded Judgment if he ad Billam, &c. * *respondere compelli debeat.*

The Plaintiff replied *Protestando*, that the Plea was insufficient, *pro plito dicit quod repelli non debet quia dicit, that befoze the Promise, King James II. by Letters Patent, exemplified under the Great Seal of the King and Queen, had pardoned the Treason and the Attainder, quam quidem exemplificationem idem (the Plaintiff) profert hic in Curia, &c. and concluded in this form, Unde petit Judicium & damna sua occasione non performance assumption. & promiss. predict. sibi adjudicari, &c.*

For the De-
fendant.

And upon a general Demurrer it was objected against this Replication, that it was not sufficient to plead and shew the Exemplification of the Pardon, &c. but that the Plaintiff ought to produce the Pardon it self under the Great Seal, because the Exemplification of a Pardon is not within the Statute † 13 Eliz.

† 13 Eliz. c. 6.

* 5 Rep. 53.

But * Page's Case being contrary in Point, this Exception was over-ruled.

2. The Conclusion of this Replication is ill, because it prays Damages occasione non performance, &c. and upon a *Respondeat ouster*, no Damages are given, therefore he ought to conclude thus: *ff. Et petit judicium si, &c. respondere compelli non debeat & quod (the Defendant) ad Billam suam predict. respondeat.*

Co. Ent. 248.
a.

For the
Plaintiff.
† Co. Ent.
160. a.
Rast. Ent.
663. a.
681. b.

On the other Side it was alledged for the Plaintiff, that in the Entries cited in the † Margin, Replications to Pleas in Nonability are concluded as this:

2 Lev. 142.
Yelv. 117,
137, 138.
See Postea
Carter ver.
Davis.

But it was resolved by the Court, that this improper Conclusion of the Replication made it ill, for all the Pleading was discontinued, because the Plea was in Disability, and so concluded; and the Replication was concluded as a Plea in Bar, and so no Manner of Answer to the Plea, but a Replication at large, and as none at all; so that all is discontinued for Default of a Replication; but if it had been concluded generally, (*viz.*) *Petit judicium si, &c.* that might have been good.

Co. Lib. 4.
62. a.

So the Rule of Court was, that the Plea was discontinued, and not that the Bill shall abate; *Quod nota.*

Hele *versus* Foot. Pasch. 2 W. & M. B. R.
Rot. 325.

IN Replevin for taking his Cattle in quodam loco vocat' S. in Plimpton St. Mary in Devonshire.

Judgment
that the
Writ should
abate, and
for what
Reason.

The Defendant pleaded, that he took the Cattle in quodam loco vocat' D. in Plimpton, &c. and traversed, that he took them in S. prout, &c. and pro retorn' habend' he made Conusance as Bailiff to George Parker, who was seised in Fee of the said Place called D. who demised it to T. S. rendring Rent for a certain Number of Years, and that for Rent Arrear he distrained as Bailiff to the said George Parker.

The Plaintiff replied Protestando, that the said George Parker did not demise the said Place called D. to the said T. S. prout, he traversed, that the said George Parker was seised of the Place called D. in Fee at the Time of the Demise.

And upon a general Demurrer to this Replication,

Holt Chief Justice, at the first Opening the Cause, held, that all the Pleadings were discontinued, because there was no Answer to the Plea and Traverse, which are in Abatement of the Writ; and that the Plaintiff had nothing to do with the Matter alledged pro retorno habend', but ought to have maintained his Writ by taking Issue upon the Traverse in the Plea; and therefore because the Defendant had demurred, and the Plaintiff joined in Demurrer, all is discontinued, and the Defendant shall have no other Judgment as it was held in * Herlakenden's Case.

7 H. 6. 5. a.
Yel. 5. 6. 65.
1 Sand. 338.

Moreover, the Defendants in this Case ought not to have demurred, but should have taken Judgment as by nil dicit, because this Replication is as none; and so he concluded, that all was discontinued; and therefore the Defendant could not have Judgment pro retorno habend'.

But the other Judges held, that the Judgment should be, that the Writ shall Abate, and that the Defendant should have a Retorn' habend', because he had demurred to the Plea in the same Term; and the Chief Justice would not oppose them in this Matter; and therefore the Judgment was, that the Writ should abate; quod nota.

*4Rep. 61. a.

7 H. 6. 5.
Plowd. Com.
138.
Yel. 38.
2 Cro. 27.

D E

Term. Sanct. Trin.

2 Willi. & Mariæ, in B. R.

Rice *versus* Langford. Hill. 3 Jac. II.
Rot. 1059.

A Fine with
a Grant and
Render, al-
ters the
Quality of
the Estate.

UPON a special Verdict in Ejectment, the Case was
to this Effect:

H. A. being seized in Fee of the Lands in Que-
stion as Heir at Law ex parte materna, he and
his Wife levied a Fine, &c. for cognisance de droit, &c.
to B. and C. and by the same Fine they granted and ren-
dered the same Lands to A. and his Wife in Tail, Re-
mainder to the Right Heirs of A.

Afterwards A. and his Wife died without Issue, and
without any Heir ex parte materna of A. and the Defen-
dant claimed as Heir at Law to A. ex parte paterna; and
the Lessors of the Plaintiff being Lords of the Fee claim-
ed by Escheat.

The sole Question was, if A. took a new Estate by this
Fine with a Grant and Render, or whether he was in again
of his old Estate which was ex parte materna, and in the
Argument of this Case it was agreed by all, that if the
Fine had been levied generally without any Render, or
without any Uses declared, the resulting Use which would
have devolved on the Cognisor, would have been the old
Use in the same Quality as it was before.

So if the Use of this Fine had been declared or limited to the Conusor and his Heirs, the Quality of the Estate would not have been altered thereby, but the Lands would have descended in the same Manner as if no Fine had been levied, (viz.) if it was ex parte materna then to the Heirs ex parte materna, and not to the Heirs ex parte paterna, & sic e converso. 3 Lev. 406.

And it was insisted for the Plaintiff in this Case, that nothing in Fact passed to the Cognissee, but only in Form, and all the Estate moved from the Cognisor; for, if in such Case the Cognissee had been a Feme Covert, she should not have been examined, and the Widow of such a Cognissee would not have been endowed. For the Plaintiff.

Wherefore, the Estate of the Cognissee is only an Estate quousque, as in the common Case where an Use is limited to A. quousque such a Marriage shall take Effect, &c. and to maintain this Opinion, the Cases in the * Margin were cited. * 5 E. 4. 17.
8 H. 4. 12.
1 Inst. 12, 13.
Dyer 11.
3 Leon. 1.
Rol. Abr. 676.

But it was answered, and so resolved by the Court, that this Case was different from all Cases put upon Uses; whether they are Uses resulting or Express; for there the Use which at Common Law was only a Trust, came in place of an Estate, and always retained the same Quality with the Estate. 2 Rep. 73.
The Lord Cromwell's Case.

And in Case of a Trust at Common Law, if a Man was seised ex parte materna, and made a Feoffment without any Consideration, the Trust resulted to the Feoffor, and was of the same Quality with the Estate; but yet if the Feoffee reinfcoffed the Cestui que Trust, the Nature of the Estate was altered, and it shall descend to the Heir ex parte paterna, for he could not enfeoff the Cestui que Trust to him and his Heirs, ex parte materna, because there was no such Limitation of the Inheritance in him. 3 Lev. 406.

But it was resolved, that this Case of the Fine with Grant and Render is all one in Effect as a Feoffment and Reinfcoffment; and by Consequence the Quality of the Estate is altered, and so it shall descend to the Heir ex parte paterna; and to prove this, the Cases in the * Margin were cited. * 1 Inst. 76. b.
3 Cro. 727, 792.
6 Rep. 63.
Sir Moyle Finch's Case.

It was likewise said, that a Warranty might be annexed to a Fine with Grant and Render, as it was resolved in 3 Cro. 17. Co. Ent. 579. a.

And for these Reasons the Defendant had Judgment.

Shotter

Shotter *versus* Friend. Hill. 2 W. & M. B. R.

Rot. 39.

1. C. 1. Shotter 1547. 2. Salk. 547.
 a Salk. 547.
 Prohibition
 to the Spi-
 ritual Court
 for denying
 a Proof by
 one Witness,
 as to the
 Payment of
 a Legacy.

Prohibition to the Spiritual Court in which the Plain-
 tiff declared to this Effect :

It That one John Friend made his last Will, and be-
 queathed a Legacy of 10 l. to Mary Friend, and made the
 Wife of Shotter Executrix, and died; the Plaintiff paid
 the Legacy to Mary Friend, who afterwards died intestate;
 and the Defendant as her Administrator libelled against the
 Plaintiff for this Legacy of 10 l. to which he alledged in
 that Court by way of Plea, that he had paid the said Le-
 gacy to Mary Friend in her Life-Time, which Payment
 he offered to prove by one credible Witness; but the Court
 refused the Plea, because one Witness per se is not suffi-
 cient by their Law to prove any Matter of Fact.

The Defendant pleaded, that before the Prohibition was
 brought and delibered, Sentence was given in the Spiritual
 Court against the Plaintiff.

And upon a Demurrer to this Plea, it was insisted for
 the Plaintiff, that 'tis a Maxim in Law, that where the
 Common and the Ecclesiastical Law differ, the Common
 Law shall always be preferred; and that those Laws differ
 in several Points concerning Evidence; for by that Law
 the Father cannot be a Witness where the Son is a Party,
 & e contra; so in the Case at Bar the Proof of the Fact by
 one Witness is not good by their Law, but 'tis otherwise
 at Common Law; for 'tis reasonable, that the Proof, which
 is good for Payment of a Debt, should be likewise sufficient
 for Payment of a Legacy.

Moreover upon such single Proof, the Plaintiff would
 have Relief in Chancery, and for the same Reason shall
 have a Prohibition here, and the Cases in the * Margin
 were cited, to prove that Prohibitions have been granted
 in Cases of this Nature.

* 3 Cro. 88.
 666.
 Moor 413,
 907.

1 Rol. Rep. 12. 2 Rol. Rep. 42. 439, 490. Hob. 247. Yel. 92. 2 Rol. Abr. 299. Latch.
 117, 217. 3 Bulst. 242. Hutton 22. Poph. 59. Hob. 188.

Now, supposing a Testator owed Money upon Bond to
 the Value of the Assets, and he had devised several Lega-
 cies by his Will; and this Bond is proved by one Wit-
 ness, and the Legatees libel against the Executors, who
 plead

plead this Bond in that Court, and they disallow the Plea, because the Bond is proved by one Witness alone; in this Case, if a Prohibition should not go, that Court would compel the Executor to pay the Legacies; and yet he (the Executor) would be chargeable to the Obligor, for as to him the Payment of the Legacy would be a Devastavit.

It cannot be denied, but that the Spiritual Court hath Cognisance of the original Cause, which, in this Case, is the Legacy, and therefore they shall have Cognisance of all the Incidents and Dependences thereon; besides, one Witness is not conclusive Evidence at Common Law, but only Evidence to induce the Jury to find the Matter.

Econtra.
* 2 Roll. Abr.
298, 299.
Hob. 12. 12
Rep. 63. Her-
ley 87. 2 Inst.
608. Linw.
174. Sid. 161.
1 Inst. 6. b.

But in Michaelmas-Term, anno 2 W. & M. it was argued and resolved by all the Court seriatim, that a Prohibition should go; and first it was allowed, that regularly where the Spiritual Court hath Cognisance of the Principal, they shall have Cognisance of the Incidents and Accessories; but if the Incident is a Matter merely temporal, they must proceed there according to the Course of the Common Law, and not secundum jus Ecclesiasticum; for if they do, a Prohibition will be granted; as for Instance; in the Case of a Nuncupative Will, which is merely Spiritual, (and such a Will is none in their Law, unless proved by Two Witnesses at least) no Prohibition shall go, though they disallow the Will, because proved by one Witness, and no more, for that Court hath Cognisance of the Probate of Wills; but yet if a Revocation of such Will is pleaded there, and proved by one Witness, and they refuse the Plea for Want of sufficient Proof, a Prohibition shall go; Quod nota.

Yelv. 91.

So where a Suit is brought in that Court for Subtraction of Tithes, which is of Spiritual Cognisance; and the Defendant pleads there, that he had set out the Tithes, which he proved by one Witness, but they refused to allow the Plea, because the Defendant had not given the Parson Notice of setting out the Tithes; yet upon suggesting this Matter, a Prohibition shall go, because Notice is not requisite by the Common Law; therefore if they will proceed upon such an Incident, according to the Ecclesiastical Law, they shall be prohibited.

But it was agreed, that a Suggestion that the Spiritual Court objected as to the Credibility of a Witness, is not a sufficient Ground for a Prohibition, for they are the proper Judges

Judges of the Credit of a Witness; likewise 'tis not a sufficient Ground for a Prohibition, to suggest that the Plaintiff had only one Witness to prove the Fact, unless he alledge, that he offered such Proof, and it was refused for Insufficiency.

Cro. Eliz. 88.
* 1 Vent. 291.

And a Case was now remembered between * Richardson and Desberow, adjudged in this Court, when Hale was Ch. Justice, which was the same with the Case at Bar, and likewise after Sentence; and yet a Prohibition was granted.

4 Rep. 301.
F.N.B. 97. B.
33 H. 6. 8.
1 Inst. 6.

And Holt Ch. Justice held, that it was not necessary in any Case at Common Law, that a Proof of Matter of Fact should be made by more than one Witness; for a single Testimony of one credible Witness was sufficient to prove any Fact; and that the Authorities cited in 1 Inst. 6. b. did not Warrant that Opinion, which was there founded on them.

The Plaintiff had Judgment for a Prohibition.

Rudd *versus* Berkenhead. Hill. 1 & 2 Will. & Mar. B. R. Rot. 164.

The Statute of Limitations pleaded to an Action for Attorney's Fees.

ASSUMPSIT for Fees due to an Attorney, the Defendant pleaded Non Assumpsit infra sex Annos.

The Plaintiff replied, that on such a Day, two Years before he had sued out an Attachment of Privilege against the Defendant, upon which Writ, Taliter processum fuit, that the Defendant (on such a Day) in Hillary-Term, anno 2 Willi. &c. appeared, and the Plaintiff declared against him modo & forma, &c.

And upon a Demurrer to this Replication it was held ill, because the Plaintiff did not set forth any Continuance of this Writ of Attachment (per vic. non misit breve) which was sued out above two Years ago; for 'tis impossible that the Defendant should appear in Hillary-Term, Anno 2 Will. to a Writ returnable two Years before, and no other Writ is set forth by the Plaintiff.

But if the Plaintiff, after the Taliter processum fuit, had shewn the last Attachment, and the Return thereof, upon which in Truth the Defendant did appear, it had been well enough, without shewing any of the Continuances.

Thereupon the Plaintiff moved to discontinue; which was granted.

Ryding *versus* Edwin and Fleet Vic. London.
Mich. 1 Will. & Mar. B. R. Rot. 30.

THE Case, *ff. A Prisoner in Wood-street Counter, upon mesne Process, on a Plaint levied against him, &c. escaped, upon which the Plaintiff brought an Action against both the Sheriffs of London.*

And upon a Demurrer to the Declaration, the only Question was, Whether this Action was maintainable against both the Sheriffs, or whether it ought to be brought against Edwin alone; for the Plaint was levied before him, and the Prisoner escaped out of his * Counter, and by his Negligence alone.

Upon an Escape out of one of the Counters, the Action must be brought against both the Sheriffs.

* 3 Cro. 185.
1 Roll. Abr. 806.

'Tis true, the Cases cited in the Margin prove, that the Action should be brought against one of the Sheriffs alone, but the modern Precedents are otherwise, several such Precedents being now produced, where the Action was brought against both Sheriffs; and in † Co. Ent. it appears upon the Return of an Habeas Corpus, that both the Sheriffs have the Custody of all the Prisoners in both the Counters, and by Consequence this Action is well brought.

† Co. Entr. 436.

Ashcomb *versus* The Hundred of Elthorn. Hill.
2 Will. & Mar. B. R. Rot. 901.

THIS was an Action upon the Statute of Hue and Cry, and upon a special Verdict found, the Case appeared to be thus:

The Plaintiff sent T. S. his Servant to Smithfield Market with fat Cattle, where he sold them for 108 l. and sealed up 106 l. in four Bags, and delivered them to I. N. a Quaker, who travelled with him towards home, and they were both robbed within this Hundred, (*viz.*) The Quaker was robbed of 106 l. and the Servant of 40 s. and now the Plaintiff (whose Money it was) brought this Action for 108 l.

3 Mod. 287.
S. C.
2 Salk. 613.
S. C.

That T. S. the Servant only made Oath of the Robbery within twenty Days, &c. according to the Statute, but that the Quaker had not made any Oath, &c.

Where a Servant is robbed, and not in the Presence of his Master, the Servant may bring the Action upon the Statute; but if in the Presence of his Master, then the Master may bring the Action.

The Question was, Whether this Oath made by the Servant alone, without the Oath of the Quaker, who refused

* 27 Eliz.
cap. 13.

to swear, was sufficient for the Master to maintain this Action upon the * Statute, &c.

And in Michaelmas Term following it was adjudged by the whole Court for the Plaintiff, as to the 40s. taken from T. S. his Servant, but against him as to the 106 l. taken from the Quaker, who would not swear; the Court being of Opinion, that the Statute aforesaid, which enjoining the Oath, was made merely for the Benefit of the Hundreds, who were oppressed by pretended Robberies, and therefore the Court would not depart from the express Words of that Statute.

Where the
Judgment
must be en-
tered with
several Da-
mages.

Nota; On the back Side of the Distringas, the Entry of the Verdict as to the Damages was entire, (viz.) pro damnis 17 l. but it was ordered, that the Judgment should be entered with several Damages; for that the Ch. Justice, who tried the Cause, directed it should be so at the Trial, and that the Associate was mistaken by Entering it in that Manner.

2 Roll. Abr.
681
Style 156.
1 Leon. 323.
2 Brownl. 10.

And Holt Ch. Justice declared, that T. S. the Servant, who delivered the 106 l. to the Quaker, and was present at the Robbery, might well maintain the Action in his own Name for all the Money, and that his own Oath would be sufficient, and that he might declare upon the Taking away the Money from the Quaker, as his Servant (who in Truth was so for this Time).

Nota; This Advice of the Ch. Justice was observed in another Action brought for the 106 l. taken from the Quaker.

And in the Arguing of the Case aforesaid, one Jones's Case was cited, which was adjudged in B. R. in Michaelmas-Term 1658, which was thus:

Jones *versus*
Hundred of
Bromley.

J. Jones, and his Wife and Servant, travelling together, were all robbed of his Money, and Jones alone brought the Action for the whole Money against the Hundred, as well for what was taken from his Wife and Servant, as from his own Person; and he alone, without his Wife or Servant, made Oath of the Robbery; all which Matter being found on a special Verdict, it was adjudged, that his Oath alone was sufficient, within the Intent of the Statute; and altho' it was farther found, that the Servant of Jones, who was robbed with his Master, knew one of the Robbers (whose Name was Lenoe) yet Jones had his Judgment; Quod nota.

And Holt Ch. Justice remembered another Case tried before him at the Sittings in Westminster after last Easter-Term,

Term, between Bird and the Hundred of Ossulstone, where the Evidence was thus:

Bird v. Hundred of Ossulstone.

11. That Bird was a Laceman of Colliton in Devonshire, and coming to London with his Servant, they left the usual great Road between Brentford and Hammersmith, and rode through a By-Lane near Serjeant Maynard's House, to avoid the Dust; and in that Lane the Servant was robbed in the Presence of his Master of a Box of Lace which was behind him, on the Back of the Horse to the Value of 1200l. and Bird the Master alone made Oath of the Robbery, and brought the Asson; and he (the Chief Justice) was of Opinion, that the Oath by the Master alone was sufficient, because he (the Master) being present, the Goods were in his Possession, for the Possession of the Servant in the Presence of his Master is his (the Master's) Possession, and that was the Reason of Jones's Case supra; and Bird recovered a Thousand Pounds, and had Execution.

Brickwood *an Attorney versus* Fanshaw. Hill.

1 W. & M. B. R. Rot. 1150.

A Scumpfit for Attornies Fees, in which the Plaintiff declared specially upon a Prosecution of a Writ of Habeas Corpus cum causa, to remove a Plaintiff against the Defendant Fanshaw by one T. S. in an inferior Court, (viz.) Malden Court in Essex, and also for defending in that Suit after it was removed here in B. R.

The Statute concerning Attornies and their Fees, doth not extend to Fees for prosecuting in inferior Courts.

The Defendant pleaded the Statute * 3 Jac. by which 'tis enacted, That an Attorney shall not be allowed any Fees laid out for Counsel, unless he have Tickets thereof signed by the Hands of them who receive such Fees; and avers that the Plaintiff had not produced to him (the Defendant) any Tickets for the Fees of Counsel, &c. under their Hands as he ought.

* 3 Jac. 1. cap. 7.

And upon a Demurrer to this Plea the Plaintiff had Judgment, because this Statute did not extend to Matters transacted in inferior Courts, but only to Suits in the Courts of Westminster-Hall; Quod nota.

Gold & al' *versus* Strode.

3 Mod. 324.
S. C.
Where Administration
is granted
by a Peculiar, where
there are
Bona notabilia, 'tis not
void, but
voidable.

THE Case, si. A. obtained a Judgment in B. R. against B. and then died Intestate, and the Plaintiffs took out Administration by an Inferior Ordinary, (viz.) the Archdeacon of Bridgwater, and brought a Scire facias upon that Judgment, upon which they had Judgment to have Execution, and thereupon a Ca. sa. issued against B. upon which he was taken, and in Custody of the Defendant, who was Sheriff, &c. and afterwards escaped, upon which the Plaintiffs brought an Action of Debt against the Defendant nuper Vic. &c.

Upon Nil debet pleaded the Parties were at Issue, and a Verdict was found for the Plaintiffs.

5 Rep.
Prince's Case
29.
10 H. 7. 16,
18, 19.

1 Roll. Abr.
810.
2 Bulst. 62,
63.

Curia.

And now it was moved in Arrest of Judgment, for that it appears in the Declaration, upon the Plaintiff's own Shewing, that this Administration was granted to them by a peculiar Jurisdiction, whereas it likewise appeared, that the Intestate had *Bona notabilia* in another Diocese, (viz.) This Judgment at Westminster, for which Reason this Administration granted by a peculiar Jurisdiction, (viz.) by the Archdeacon, is merely void; and if so, then the Judgment obtained upon this Scire facias is utterly void; and then an Action of Escape will not lie against the Sheriff for the Escape of a Prisoner taken upon a void Judgment; for if there is no Judgment against B. then there is no Cause to detain him in Prison.

To which it was answered and so resolved, that this Matter was only Error, of which the Sheriffs could not take Advantage in an Action for an Escape brought against him; and the Difference is where the Judgment is merely void, and where 'tis only erroneous; and this depends upon another Distinction, (viz.) where the Court in which the Judgment was obtained had Cognisance of the Cause, and where not; for in the first Case, if the Plaintiff obtain a Judgment, and by his own Shewing had no Cause of Action; yet because the Court had Jurisdiction of the Cause, this is only an erroneous, and not a void Judgment; but 'tis otherwise where the Court had no Jurisdiction of the Cause.

21 Ed. 4 23. b.
1 Roll. Abr.
809, 910.
Moor 274.
2 Cro. 3.

But in the principal Case, the Court had Cognisance of the Cause, and therefore the Matter alledged supra is only Error.

Nota;

Nota; It was agreed in this Case, that the Judgment obtained in the Court at Westminster made Bona notabilia, tho' the Action upon which it was obtained was laid in Dorsetshire, because the Record was at Westminster.

Nota also, that the Plaintiffs in their Declaration had shewed all the Proceedings to the Judgment upon the Sci. fa. at large, by Reason whereof the Letters of Administration, and by whom granted, plainly appeared by their own Folly in declaring; for the Court held clearly, that the Plaintiffs in this Action against a Sheriff, might declare briefly upon the Judgment in the Sci. fa. without shewing the gradual Proceedings at Length, as is usually done in an Action of Debt on a Judgment; Quod nota.

Woolridge *versus* Cloberry. Mich. 4 Jac. II.
B. R. Rot. 15.

ERROR upon a Judgment in C. B. in an Action on the Case for diverting a Water-course, brought against six Defendants.

They all pleaded jointly Not guilty; thereupon a Ve. fa. was awarded, and a Distringas with a Nisi prius; but before the Day of the Nisi prius, T. S. one of the Defendants, died; afterwards the Plaintiff had a Verdict, and Judgment was entered against all the six Defendants, (viz.) Against T. S. who was dead, ut supra, together with the Survivors.

Thereupon all the Survivors brought a Writ of Error, and assign the Death of T. S. and the Judgment aforesaid, for Error; and the Judgment was reversed as to all of them; for in such Case the Plaintiff ought to make a special Entry of the Death of T. S. with Nihil ulterius versus eum fiat, and then to take Judgment only against the Survivors, and not against him who was dead.

Newton *versus* Trigg. Mich. 1 Jac. II. B. R.
Rot. 226.

IN Trespas for Taking his Goods, &c. Upon Not guilty pleaded, a special Verdict was found to this Effect:

That the Plaintiff was a Citizen of London and a Common Inn-keeper, and bought all his Provisions and sold

Six Defendants, and before the Day of Nisi prius one died, and Judgment was entered against all Six; this is ill.

3 Mod. 326.
S. C.
3 Lev. 309.
S. C.
1 Salk. 109.
S. C.
Inn-keeper not a Trader within the Statute of Bankrupts.

sold them again in his Inn, per quod he got his Livelihood, and that he had built a Ship and had a Share therein, and also 500 l. Stock upon the said Ship ad merchandizand'; but it was not found, that he traded therewith, or that he any wise traded in the Ship; and that a Statute of Bankrupt had been taken out against him, and that he was declared a Bankrupt, and that the Goods now in Question were the Plaintiff's Goods, and assigned to the Defendant by the Commissioners of the Statute of Bankruptcy.

The only Question was, Whether upon the Matter thus found, the Plaintiff was a Trader within the Statutes of Bankruptcy.

For the
Plaintiff.

Dyer 158. b.

And it was argued for him, (viz. for the Plaintiff) that an Inn-keeper is not like a Trade, because he is obliged to entertain all Travellers; and if he refuse, without good Cause, an Action lies against him.

2 Cro. 609.

Besides, certain Rates and Prices are and may be imposed upon all his Commodities; and if he extort any unreasonable Rates, he may be indicted, so that he hath not the Freedom of Trade, (viz.) of making the best Advantage of his Commodities, but is restrained contrary to the common Liberty of all Traders in general.

All his Profits arise by four several Means, as follow :

1. For Lodgings; and as to that Matter, Respect is to be had to the Charge of his Furniture.

2. His Kitchen, where his Servants, Instruments, and the wearing his Linen, are to be considered.

3. His Cellar, which is generally rented by a Tapster at a certain yearly Sum.

4. His Stables, where 'tis not only the Hay and Oats which are to be considered, but his Servants, House-room and Attendants; so he is in no Sort like a Tradesman, who may choose his own Chapmen, and set his own Price on his Goods, and is not under any Obligation to find House-Room, Furniture or Attendance.

Cro. Car. 549.
Merch 34.
W. Jones 437.

An Inn-keeper makes no precedent Contract, as Tradesmen do in their Way of Trade, but utters Commodities to his Guests, as he is bound to do.

1 Sid. 411.

As for his having Part of a Ship, that will not make him a Bankrupt, unless he traded therein, for having Part of it doth not make him a Trader within the Statutes

tutes of Bankruptcy; and as to the Stock, 'tis not found that he bought or sold any Thing therewith; both which Circumstances are necessary to make a Bankrupt.

Afterwards in Trinity-Term, 3 W. & M. it was adjudged by the whole Court for the Plaintiff; and it was resolved by all, that the Building and having a Share in a Ship, is no more than if a Man hath a Share in a Barge or a Coach which are let to Hire, &c. and that his having some Stock in a Ship doth not make him a Merchant, because 'tis frequent for Persons to adventure some particular Things in such a Ship, for such a Voyage, but that will not make them Traders within the Statutes, &c. for by those Statutes professed Merchants are only meant, or such who are in constant Trading.

And now * Sir Tho. Littleton's Case was remember'd, who was Victualler of the Navy, and by that Means contracted many Debts; yet because this was an Undertaking for a particular and special Purpose, and not general; therefore 'tis not within the Statutes of Bankrupts.

Besides, an Inn-keeper buys to sell only in his own Inn, and not elsewhere, which is not a general Buying and Selling, so as to make him a Trader, and that a School-master, who boards several Scholars in his House, might as well be a Bankrupt for that Reason as an Inn-keeper, because their Buying and Selling are much of the same Nature; but it hath been adjudged, that the Keeping a Boarding-School is not a Trade within these Statutes; and that none are Traders but such who live by the mere Advance of the Value of a Commodity; and an Inn-keeper is not by the Law taken Notice of as a Trader, for in the Register he is called Communis Hospitator, and Inns are no more than great Ale-houses, and are within the Statutes concerning Ale-houses, and that an Inn-keeper is no more a Trader than a Sutler to an Army, or a Steward to an Inn of Court, who deals only with particular Persons, and to particular Purposes; and for these Reasons it was adjudged, that an Inn-keeper, as such, could not be a Bankrupt.

Judgment for the Plaintiff.

Quilter *versus* Newton.

IN a Prohibition, the Case was, that Newton, one of the Church-wardens of St. Buttolphs, London, libelled against Quilter for Stopping the Church-door and Windows

Suggestion for a Prohibition, not good.

dows by Sheds, &c. built (as he supposed) upon Part of the Church-yard.

And now it was moved for a Prohibition upon a Suggestion, that the Conusance of Lay Fees appertains to the Temporal Courts, and that Sir Cha. Humphrevile was seised in Fee of a Messuage and Curtilage near the Church-yard, as of his Lay Fee, and that he demised the same to Quilter, &c. and that Newton had libelled against him for Building upon the Church-yard, ubi revera the Sheds, &c. were not built upon any Part of the Church-yard, but upon a Lay Fee; and this was held a good Suggestion, because it was averred, that the Sheds did not stand upon any Part of the Church-yard.

Sed nota; per Curiam, A Prohibition shall not be granted to any Suit in the Spiritual Court for any Nuisance, or other Matter done in the Church-yard, upon a Suggestion, that the Church-yard is a Lay Fee, for a Nuisance there is properly of Ecclesiastical Conusance.

* Ogden v.
Wiseman.
Pas. 28 Car. 2.
B. R.

And in debating the Case supra, * another Case was mentioned, which was adjudged in B. R. when Hale was Chief Justice; and the Copy of the Prohibition was now produced, which was concerning the same Matter in the same Place; and the Church-wardens libelled, and Ogden suggested, ut supra, only he did not aver, that the Structures were not built upon any Part of the Church-yard, but only that it was the Lay Fee of Sir Cha. Humphrevile; and thereupon a Prohibition Nisi was granted, and the then Rule of Court was now produced.

But the Court held that Case to pass sub silentio, without any Debate, for it was not remembered by any, and they held this Kind of Suggestion was insufficient causa qua supra.

The Mayor and Church-wardens of Northampton's Case.

Warrant of
Commit-
ment ill con-
cluded.

THE Mayor of Northampton committed the Church-wardens for refusing to account before him, and the Warrant of Commitment concluded in the common Form, (viz.) until they be duly discharged according to Law; and all this appearing upon the Return of an Habeas Corpus, the Court held the Commitment void, because the Warrant ought to have been thus concluded, (viz.) there to remain

main until he shall account, as the Statute 43. cap. 2. doth appoint.

And the Difference is where a Man is committed as a Criminal, and where only for Contumacy (as in this Case) in refusing to do a Thing required, &c. for in the first Case, the Commitment must be until discharged according to Law; but in the later, until he comply, and perform the Thing required; for in that Case he shall not lie till a Sessions, but shall be discharged upon the Performance of his Duty.

Wherefore the Churchwardens were discharged by Rule of Court; quod nota.

cluded their Warrant, (viz.) *Until he conform himself to our Authority, and be thence delivered by due Course of Law*; and upon the Return of an *Habeas Corpus* he was discharged, because this Conclusion was not pursuant to the Statute of Bankrupts; and the Mayor of Northampton's Case was cited for an Authority.

Mich. 8 Will.
One Bracy was committed by Commissioners of the Statute of Bankrupts, for refusing to answer, and they con-

Frederick *versus* Hook.

DEBT upon Bond as Administrator to the Lady Frederick; the Defendant prayed Oyer of the Letters of Administration, by which it appeared, that the Plaintiff was a special Administrator quoad this Bond only pendente lite concerning the Last Will of the said Lady.

Administration granted pendente lite, where 'tis good, where not.

And thereupon the Defendant pleaded in Abatement, that the Lady Frederick made her Will, and thereby constituted the Plaintiff her Executor, and that the Plaintiff Suscepit super se onus Executionis testamenti præd. unde ex quo the Plaintiff brought this Action as Administrator, and not as Executor, petit judicium de billa, &c.

And upon a Demurrer to this Plea, the Court held, that an Administration pendente lite concerning a Will, was utterly void, and that the Difference is thus, (viz.) Where there is a Controversy in the Spiritual Court concerning the Right of Administration, and where 'tis concerning a Will, as in this Case; for in the first Case, an Administration granted pendente lite is good; but 'tis otherwise where the Controversy is concerning a Will; for he who comes in under a Will, shall avoid all that which an Administrator can do; and a Case was cited * Trin. 24 Car. 2. B. R. which was Trover brought by the Plaintiff for the Conversion of his Goods; and upon Not guilty pleaded, there was a special Verdict found, that the Plaintiff was the Executor named in the Will of T. S. whose Goods

* 3 Keeble
54. Smith
versus Smith.

they were, and that the Defendant had Administration granted to him of the Goods of the said T. S. pendente lite concerning the Will, and there it was adjudged for the Plaintiff, because the Administration was merely void upon the Distinction *supra*.

Nota; per Curiam, An Executor may maintain Trover in his own Name before the Seizure of the Goods, or Probate of the Will; but in the principal Case the Plaintiff did not proceed any farther

D E

Term. Sanct. Mich.

Anno 2 Willi. & Mariæ in B. R.

Burchett *versus* Durdant.

T. Jones 99.
1 Vent. 334.
2 Vent. 311.
2 Lev. 232.
Raym. 330.
By the Name
of Jones *ver.*
Richardson.

Where a Remainder shall vest presently, where not.

WRIT of Error in Parliament upon a Judgment given in the Exchequer-Chamber, which was in Affirmance of a Judgment in Ejectment brought by Durdant against Burchett in B. R. The Case being on a Devise in hæc verba:

ff. I give unto John Higden, and his Heirs, during the Life only of Robert Durdant, my Lands in D. upon Trust, to suffer the said Robert Durdant, during his Life, to receive the Rents and Profits, (the said Robert Durdant committing no Waste) and after the Decease of the said Robert Durdant,

I do give the said Lands unto the Heirs Male of the Body of him the said *Robert Durdant*, now living, and to such other Heirs Male and Female as he shall hereafter happen to have of his Body, &c.

Now, at the Time of this Devise, and at the Death of the Testator, the aforesaid *Robert Durdant* had only one Son named *George Durdant*, and then living.

After the Death of the said Testator, he the said *John Higden* and *Robert Durdant*, join in a Feoffment and Fine of the Premises to *Burchett*, the Plaintiff, in the Writ of Error; and the Defendant in the said Writ was Lessee of the Son and Heir of *George Durdant*.

The general Question was, Whether *George Durdant*, the Son of *Robert*, took a present Remainder in Tail by this Will as a Purchaser, and so vested in him immediately upon the Death of the Testator, or else a contingent Remainder, (viz.) if he happened to survive his Father *Robert Durdant*; for if so, then it was barred by the Fine and Feoffment supra, because the Remainder could not commence at the Time of the Determination of the particular Estate, as in the common Case of Remainders limited to the right Heirs of I. S. and the particular Estate determines living I. S.

But all the three Courts, (viz.) of King's Bench, * Exchequer-Chamber, and Parliament, held clearly, that it was a Remainder vested in *George Durdant* immediately upon the Death of the Testator, and that the Words in the Will, now living, were a sufficient Description of the Person of *George Durdant*, and that the other Words, (viz.) Unto the Heirs Male of the Body of *Robert Durdant*, did not only help to make up the Description of the Person of *George*, but were a good Limitation of an Estate-tail to him, as in the Case supra, where 'tis limited to the right Heirs of I. S. there the Word Heirs serves not only to describe the Person, but to limit the Estate.

Wherefore the two former Judgments were now again affirmed; and there was the like Judgment in Parliament concerning Part of the same Lands so devised as aforesaid; and it was in Ejectment between † *Jones* and *Richardson*, another Purchaser of Parcel, under *Higden* and *Robert Durdant*.

* 2 Vent. 311.

† 2 Lev. 232.
Raym. 330.

The King, &c. *versus* Champion.

UPON a Certiorari to remove the Order of two Justices, and upon the Return thereof it appeared to be an Order to compel Champion to pay Wages, recited to be due to a Day-Labourer, not retained by the Peer, according to the Statute 5 Eliz. and it was held clearly by the Court, that this Order was void, because the Justices of Peace have no Authority concerning the Wages of Servants, but only of such who are hired by the Peer, according to the Statute, and who are hired in the Service of Husbandry, which not appearing in this Order, as it ought, it was therefore quashed, for the Statute takes no Notice of any other Service; and the Justices have no Power concerning Wages, but what is given by that Stat.

Hanson *versus* Leverfedge. Hill. 1 & 2 Will.
& Mar. C. B. Rot. 1471.

2 Vent. 242.
S. C.
Where a
parol Award
is not good
for the In-
certainty.

THE Case, A Debt upon Bond for Performance of an Award, the Submission was, so as the Award be made in Writing, or by Word of Mouth, by such a Day, &c.

The Defendant pleaded no Award made.

The Plaintiff replied specially, (viz.) That before and at the Time of the Submission, there was a Suit depending between him and the Defendant, for scandalous Words spoken by the Defendant, of him the Plaintiff; and that the Arbitrators did by Word award, that the Defendant should pay to the Plaintiff twelve Guineas, and all such Sums of Money as the Plaintiff had laid out or expended in and about the Prosecution of the * Plea aforesaid, and afterwards, that they should sign general Releases, &c. and the Plaintiff averred, that he had expended 11 l. in the Prosecution of the said Plea, of which the Defendant had Notice, &c. but notwithstanding he refused the Payment, &c.

* Nota, There
was not any
Plea named
before.

For the De-
fendant.

And upon a Demurrer to this Replication, it was insisted for the Defendant, that this Award was void for the Incertainty thereof, for an Award by Word ought to be as certain as an Award in Writing; now, if this had been in Writing, the Plaintiff could not have helped the Incertainty

tainly by his Averment, that there was a Suit depending when no such Thing is mentioned in the Award it self.

Moreover, This Award is incertain in another Respect, (viz.) for that 'tis for the Defendant to pay all such Sums of Money which the Plaintiff had expended in the Suit, and it doth not appear how much was spent, and no Person is assigned to reduce it to any Certainty; but if it had been to pay all the Costs of Suit, that might have been good, because there is a proper Officer to tax the Costs.

Besides, the scandalous Words for which the Action was brought ought to have been set forth in certain in the very Body of the Award, that the Court might judge whether they were actionable, or not.

But it was said on the other Side, that the Words Expenses and Costs are all one, and that in this Award the Expenses shall be intended Costs of Suit, ; and as to the Incertainty of the Sums expended, the Defendant might have traversed the Quantum of the Expenses, if the Demand had been unreasonable.

The Ch. Justice Pollexfen held, that the Award had made an End of the Suit, so that the Court had no Authority to tax the Costs; therefore, after the Award, no Judgment could be given as to that Matter, because then there was no Suit depending, and so it would make no Difference, if the Word Costs had been inserted in the Award instead of the Word Expenses; but here the Plaintiff had ascertained the Expenses by his own Averment, that he had expended so much, &c. which the Defendant might have traversed if he would.

As for setting forth the scandalous Words in the Award, 'tis not necessary, no more than to set forth a Title in it upon a Suit for Lands, because the Arbitrators are Judices facti, and the Court will not enquire into their Reasons; therefore, tho' the Suit should happen to be without any just Cause, yet the Award will be good.

Besides, in all parol Awards, 'tis sufficient to shew the Substance, tho' not in the same numerical Words; for the Court will not hold the Witnesses to the express Words of the Arbitrators.

But per Curiam, If this Award had been in Writing, it would have been void, because no Averment dehors would have been allowed to make it certain; but 'tis not so in a parol Award; quod nota.

Judgment for the Plaintiff.

Dicken

Dicken *versus* Greenville.

Writ of Error on a Judgment in Curia nostra, viz. Jac. 2. when all the Proceedings were in the Reign of Car. 2. 'tis a Variance incurable.

UPON a special Verdict in Assize all the Proceedings appeared to be in the Reign of Car. 2. but the Case was argued and adjudged in the Reign of Jac. 2. but the Judgment was entered upon the original Roll, which was a Roll of Car. 2.

Upon this Judgment a Writ of Error was brought in the Exchequer-Chamber, reciting as followeth:

ff. Jacobus secundus Dei Gratia, &c. Quia in Recordo & processu ac etiam in redditione judicii Loquelæ quæ fuit in Curia nostra coram nobis per billam sine brevi nostro, &c.

Upon this Writ of Error the Judgment was reversed in the Exchequer-Chamber, and the Transcript of the Record sent back to this Court; whereupon the Plaintiff moved, that the Court would give Judgment for him.

Thereupon the Counsel for the Defendant shewed the Marſance *supra*, and said, that there was no such Record in B. R. as was mentioned in the Writ of Error, &c. upon which the Proceedings had been in the Exchequer-Chamber; for the Judgment which the Defendant had obtained against the Plaintiff was upon a Loquela in the Reign of Car. 2. and not in the Court of Jac. 2. and this was held an incurable Fault, and thereupon the Plaintiff brought another Writ of Error, &c.

Reusby *versus* Manning. Trin. 2 Will. & Mar. Rot. &c. But adjudged in this Term.

3 Mod. 330. S. C. Breach of an Award, where well assigned.

DEBT upon Bond for Performance of an Award, Ita quod the Award be made and ready to be delivered to the Parties in Difference, or to such of them who should desire the same by such a Time, &c.

The Defendant pleaded no Award made.

The Plaintiff replied, that the Arbitrators within the Time, &c. made their Award in Writing, which he set forth at large, and assigned the Breach, &c. but did not say, that the Award was ready to be delivered to the Parties, according to the Words of the Submission *supra*.

And for this Fault the Defendant demurred, because the Submission was conditional Ita quod, &c. and this Condi-

tion

tion ought to be performed by the Arbitrators, otherwise their Award would not oblige the Parties; and here the Plaintiff ought to shew, that all the Condition was performed, otherwise he hath no Cause of Action, and therefore in a * Case adjudged in this Court 27 Car. 2. the same Exception was taken and allowed.

* Jenkinson
versus Allen.
5 Rep. 103.
2 Cro. 577.
2 Saund. 73,
188.

And Justice Dolben cited a † Case in the Common Pleas when he was at the Bar, where the Submission was conditional, with an Ita quod the Award be made in Writing, to be delivered to the Parties, &c. and it was pleaded, that the Arbitrators did make an Award under their Hands and Seals, and ready to be delivered to the Parties, and in that Case the Exception was, that it was not expressly averred, that the Award was made in Writing, as it was required by the Submission; but it was not allowed, because it must necessarily be intended, it was in Writing, it being pleaded to be under the Hands and Seals of the Arbitrators; but Hale, who was then Ch. Justice of C. B. doubted.

† Fuller vers.
Lane.

But in the principal Case the Plaintiff had Judgment for the Reason given in Cro. Car. 541. (viz.) That it shall necessarily be intended, that the Award which was in Writing was ready to be delivered to the Parties; and likewise for this Reason, (viz.) because the Award ought to be ready to be delivered when any of the Parties required it; and it doth not appear that it was required by any of them; and therefore 'tis not requisite it should be delivered before any Request.

The Plaintiff had Judgment.

Thursby *versus* Helbert. Mich. 2 Will. & Mar.
B. R. Rot. 435.

DEBT upon Bond for Performance of an Award.

The Defendant pleaded, no Award made.

3 Mod. 272.
Where the
Award was
of one Side,
where not.

The Plaintiff replied, and set forth the Award, which was, that the Defendant, with good and sufficient Security, to the good Liking of the Plaintiff, should give a Bond in the Penalty of 300 l. conditioned for Payment of 150 l. to the Plaintiff, at or before such a Day; and upon Delivery of such Bond, each to release the other; and the Plaintiff assigned the Breach specially, (viz.) that the Defendant had not given his own Bond of 300 l. for the Payment of 150 l.

150 l. upon which they were at Issue, and the Plaintiff had a Meridit.

And now it was moved in Arrest of Judgment, that this Award was void, because it was only of one Side, for it was void quoad the Security to be given, because the Sureties were Strangers to the Submission; and then, tho' the Award may be good, so as to oblige the Defendant to give his own Bond, yet no Release is awarded for the Plaintiff to make, but upon the Delivery of a Bond with Sureties, and that being void quoad the Securities; and there being no Release to be given, but upon the Delivery of a Bond with Surety, by Consequence nothing is awarded on the Part of the Plaintiff, for he can never be compelled to release.

1 Roll. Abr.

259.

Curia.

But per Curiam, Judgment was given for the Plaintiff, because the Defendant was bound to give his own Bond, tho' the Award was void quoad the Sureties, and that as soon as the Defendant had delivered his single Bond, the Plaintiff was compellable to make a Release, for the Sureties were to be to the good Liking of the Plaintiff; and 'tis probable he might approve the single Bond of the Defendant for his Security; and this was the principal Reason why.

Judgment was given for the Plaintiff.

Williams *versus* W. Harrison and R. Harrison.

Infancy, a good Plea in Bar against a Bill of Exchange.

IN an Action on the Case brought by the Plaintiff against the Defendants, being Merchants, according to the Custom of Merchants, upon a Bill of Exchange drawn by them, and protested: R. Harrison, one of the Defendants, pleaded Infancy in Bar, &c.

And upon a Demurrer to this Plea, supposing that Infancy was no Bar to this Action founded on the Custom of Merchants.

Curia.

The Court, without Argument, over-ruled the Demurrer, for they clearly held, that Infancy was a good Bar notwithstanding the Custom; for here the Infant is a Trader, and the Bill of Exchange was drawn in Course of Trade, and not for any Necessaries; so Judgment was entered, that the Plaintiff Nil capiat per Billam *versus* R. Harrison.

And Holt Ch. Justice cited a * Case, that where an In-^{1 Roll. Abr.}
 fant keeps a Common Inn, yet an Action on the Case up-^{fo. 2.}
 on the Custom of Inns will not lie against him, which is
 stronger than the principal Case.

The King and Queen *versus* Moor.

MOOOR being a Citizen of London, had a Country-^{A Citizen of}
 house in the Parish of Hornsey, where he usually^{London, who}
 dwelt in the Summer-season, and thereupon he was chosen^{lived in the}
 by the Parishioners to be one of the Overseers of the Poor of^{Summer in}
 that Parish; and upon his Appeal to the Quarter-Sessions^{the Country,}
 an Order was made to discharge him from this Office, in^{was chose O-}
 which Order the two next Justices of the Peace were re-^{verseer of}
 quired to appoint another Man in his Room.^{the Poor}
^{there, not}
^{good.}

This Order being removed into B. R. by Certiorari, it
 was now moved, that it might be quashed, because the Ses-
 sions had nothing to do in this Matter; for the * Statute^{* 43 Eliz.}
 gives no Appeal in this Case, but is positive that the two
 next Justices shall appoint, &c.

Holt Ch. Justice was of that Opinion, (viz.) that an Ap-
 peal would not lie: Eyre Justice doubted.

But because this Order did not recite, that Moor was
 appointed Overseer by the two next Justices, therefore it
 was not quashed, for the Court held, that no Body was
 hurt by the Order, for that it did not appear that Moor was
 legally chosen Overseer, therefore the Order did not affect
 any Body.

But the Court seemed to discountenance the Parish in
 choosing such a Man Overseer, who was resident there but
 only for some Part of the Summer, and was actually an
 Inhabitant of another Parish in London.

Newcomb *versus* Harvey.

THE Plaintiff being Lessee for Years, assigned over^{Where Debt}
 his whole Term, by Indenture, to the Defendant,^{may be}
 rendering Rent, and an Action of Debt was now brought^{brought for}
 for the Rent in arrear.^{Rent, tho'}
^{the Plaintiff}
^{hath no Re-}
^{version.}

The Defendant pleaded Non concessit & hoc, &c.

And upon a Demurrer to this Plea, it was objected in
 Behalf of the Defendant, that this Action would not lie,
 Y because

because the Sum reserved was not properly any Rent, but a Sum in gross, the Plaintiff having assigned over his whole Term, and by Consequence had no Reversion, and therefore the Action ought to be for a Sum in gross upon the Contract, (and not Debt for Rent) and that would not lie till the last Day expires.

Curia.

2 Mod. 174.
1 Vent. 242.

To which it was answered, and so resolved per Curiam, that this is a Rent, tho' the Plaintiff had no Reversion; for if a Rent is reserved upon a Feoffment in Fee, there is no Reversion in the Feoffor; but yet this is a Rent, and recoverable by the Name of a Rent upon the Contract, and so it shall be in the principal Case.

Nota, A
Termor sur-
rendered to
the Lessor,
without

Moreover, if the Defendant had assigned over the Term to another, an Action of Debt would lie for the Plaintiff against the second Assignee.

The Plaintiff had Judgment.

Deed, rendering Rent; and it was adjudged, that this was recoverable, as Rent, and that it was not a Sum in gross. 1 Vent. 242, 272. 2 Lev. 80.

Hobbs qui tam, &c. *versus* Young. Hill. 1 &
2 Will. & Mar. B. R. Rot. 129.

3 Mod. 313.
S. C.
2 Salk. 610.
S. C.
* 5 Eliz.
cap. 4.
He is a Tra-
der within
the Statute
who exer-
cises a Trade
by his Ser-
vants, and
never bound
Apprentice
himself.

THE Case, ff. An Action was brought against the Defendant upon the Statute 5 Eliz. for Using the Trade of a Clothier, not having been Apprentice to that Trade, and a special Verdict was found to this Effect:

ff. That Young was a Turkey Merchant, and exported great Quantities of English Cloth into the Levant, and that for this Purpose only he hired several Cloth-workers (who had all been Apprentices to the same Trade), and kept also a Master-Workman of that Trade to inspect their Work, and that by these Men he made great Quantities of English Cloth, all which he transported; and that he (the said Young) kept a Dye-house, and hired Men of that Trade to dye his own Cloths, and no other, &c.

The Question was, Whether this Case was within the Intent of the Statute, so as to restrain the Defendant to exercise a Trade by his Servants, to which he himself had never been an Apprentice; for tho' he did nothing about the Work, yet he had all the Profit, and those Tradesmen who did the Work had no Gain by the Trade.

Holt Ch. Justice, in the Argument of this Case, cited a Case upon this Statute prosecuted by the Horners Compa-
ny,

ny, against a Comb-maker in London, for using the Trade of an Horner, (viz.) in pressing Horn for making Combs, which Pressing did not belong to their Trade; and this was adjudged a Breach of the Statute; for a Horner is a particular Trade, and a very antient Company in London.

And per Curiam, this Statute doth not restrain a Man from using several Trades, so as he had been an Apprentice to all; wherefore it indemnifies all Petty Chapmen in little Towns and Villages, because their Masters kept the same mix'd Trades there before them; and for this Purpose a Case was cited, and now allowed for Law, that where an Action was brought on this Statute, and upon Not guilty pleaded, it appeared, that the Defendant's Father kept the same Trade, and that he (the Defendant) for several Years, had been employed by his Father therein; it was held, that he might lawfully use that Trade, for that he had been quasi an Apprentice to it, which was sufficient to satisfy the Statute.

Afterwards, in Trinity-Term, 3 Will. & Mar. it was adjudged per Holt Ch. Justice, and two other Judges, for the Plaintiff,

That it had been very much controverted, Whether this Statute hath abrogated the particular Customs concerning Trades in particular Towns and Villages; but that the better Opinion was, that the Statute had not abrogated those Customs; that the Widow of a Tradesman cannot continue her Husband's Trade, unless by Custom of the Place, or that she herself had been bred to the same Trade; but they all agreed, that the Using a Trade in a private Family, for the Use of the same Family, and not to sell, was not within the Statute.

1 Cro. 347,
499, 516.
2 Bulst. 187,
191.
Noy 5.
Hutt. 131.
8 Rep. 130.
Hob. 211.
11 Rep. 54.
See 1 Jac. 2.
cap. 22.
2 Saund. 112.
* Quare, For
the common

Opinion is otherwise, for that the Wife serves as an Apprentice.

And per Holt Ch. Justice, If it had been found that the Defendant exercised this Trade by himself, it had been within the Statute, tho' it was for his own Merchandise only, and that the doing it by his Servants is doing it by himself, and the Workmen are no Traders, but his Servants, for he only is properly the Tradesman who hath the Benefit of the Trade, and not he who is the Hireling, for he hath nothing either in the Gain or Loss; and he held, that if a Coach-maker keeps Servants to make his Wheels, and Workmen to curry his own Leather, this is against

the Statute, because 'tis he only who receives all the Profits of the several Trades, and the Wheelwright, and the Carrier, are but his Servants.

And if a Man keeps Journeymen Shoe-makers to make Shoes for Transportation; this is an Exercising the Trade of a Shoe-maker within this Statute.

But Dolben Justice was of a contrary Opinion.

Bradburn *versus* Kennerdale. Mich. 4 Jac. II.
Rot. 640.

3 Mod. 318.
In Avowry
where the
Plea is not
good for
Want of a
Traverse.

ERROR of a Judgment in the County Palatine of Chester, in Replevin brought for the Taking a Cow in a Place called Shippen.

The Defendant made Conusance as Bailiff to Sir Peter Warburton, for that he (Sir Peter) tempore quo, &c. was seised of the Manor of Asley (of which the Place where, &c. is, and Time out of Mind was Parcel), in his Demesne, as of Fee, &c. and that he, the Defendant, as Bailiff, &c. took the Cow, &c. Damage-feasant.

The Plaintiff replied in Bar to the Conusance, that bene & verum est, that Sir Peter Warburton, tempore quo, &c. was seised of the Manor of Asley aforesaid, in dominio suo ut de feodo, sed diu ante pradi^a tempus quo, &c. Sir George Warburton was seised in Fee of the said Manor (whose Heir the said Sir Peter Warburton is), and of a Messuage adtunc parcell. ejusdem Manerii, of which Messuage the Place where, &c. tunc & adhuc est parcell. and being so seised, the said Sir George, before the Taking the said Cow, (viz.) On such a Day made a Lease of the said Messuage, unde, &c. to one T. S. for three Lives, and that afterwards T. S. died, and T. B. entered, and was seised as Occupant, and made a Lease for one Year unto the Plaintiff, &c. per quod, &c.

To this Replication there was a Demurrer in this Form:

II. Quod placitum præd. superius replicando placitat. minus sufficien. &c. and concludes Unde petit judicium & damna sua, &c. but did not pray any Return, and Judgment was there given for the Avowant; and that he should have a Return, &c. and that for a Fault in the Bar, which was the Want of a Traverse.

And now it was argued by the Counsel for the Plaintiff in Error.

1. That the Bar was good without a Traverse, because by the Bar all the Matter of the Conusance was sufficiently confessed and avoided, (viz.) That Sir Peter Warburton was seised of the Manor, &c. and that the Place where, &c. was Parcel thereof; for the Estate now claimed was only for Life, and the Reversion thereof always continued Parcel of the Manor; and therefore the Matter which is confessed and avoided should never be traversed.

And the Seisin in dominico suo of the Place where, &c. is not traversable, because 'tis not a positive Affirmation, but only alledged Argumentative, (viz.) as 'tis Parcel of the Manor.

Another Error was, that the Commencement of this Conusance was informal and ill, for he did not shew, that the Place where * continebat so much; for so are all the Precedents. but this was held to be only Form. * Yelv. 146.

Another Error was, that the Defendant had Judgment for a Return. habend. without making any Prayer for such a Return.

Another Error was, that the Commencement of the Demurrer was informal, (viz.) in this Word Replicando placitat, for 'tis not a Replication but a Bar; and so there being no Answer to the Bar, the Cause is discontinued.

Besides, it was alledged, that admitting a Traverse is necessary, yet it was aided by this general Demurrer. 1 Lev. 44.

But in Hillary-Term following it was adjudged by the Court, that the Bar was ill for want of a Traverse; that the Place where was Parcel of the Manor tempore capionis; for tho' it was granted, that the Reversion of the Locus in quo remained Parcel of the Manor after the Demise for three Lives; yet the Place it self, and the Freehold were severed by the Demise, and by Consequence they were not Parcel of the Manor tempore quo, &c. therefore the Plaintiff ought to have traversed that which the Defendant had affirmed, (viz.) That the Locus in quo was Parcel of the Manor of A. tempore quo, &c. Curia.

And as to this Matter, there is a Difference between Replevin and Trespass; and the Court held, that the Seisin in dominico of the Place where, &c. was not traversable; for 'tis not expressly alledged in the Conusance, that Sir Peter, &c. was seised in Dominico of the Place where, but only by Consequence, as it was Parcel of the Manor of Asley, of which he (Sir P. W.) was seised in Dominico; therefore if he had traversed the Seisin, it must have been of all the Manor.

Besides

28 H. 6. 3.
1 Bull. 48.
Dyer 134.
Bro. Compromise.
pl. 79.
1 Cro. 494.
W. Jones 401,
492.
Owen 51.

2 Bulst. 226.

1 Roll. 264.

2

Long quinto

Ed. 4. 100.

Hob. 81.

2 Vent. 212.

* 29 Car. 2.

cap. 3.

Besides it was held, that the Default of a necessary Traverse is Substance, and not aided by a general Demurrer; likewise, if a Traverse is too narrow and short of the Matter traversable, this is Substance; but where a Traverse is merely Surplusage, and not necessary; as where one traverses a Thing which he had before confessed and avoided, that is merely Form, and aided upon a general Demurrer; for the other Party might traverse that Traverse, and also the Inducement to it.

As concerning the Occupancy, per Holt Ch. Justice, the Title under the Occupant was good, for the * Statute did not take away all Occupancy, but transferred it to Executors; and he held that B. the Lessor of the Plaintiff, was Executor de son tort by his Entry on the Lands, because the aforesaid Statute made it Assers.

The Judgment was affirmed.

Edmundson *versus* Walker.

Prohibition
not granted
to the Admi-
ralty, with-
out Refusal
of a Plea.

UPON a Motion for a Prohibition to the Admiralty, the Case was:

II. That a Ship and the Furniture thereof were arrested and condemned in the Admiralty Court. to be sold to pay the Mariners Wages; and afterwards the Defendant Walker, as Executor to the Master of the Ship, exhibited an Allegation ex abundanti upon the Sentence in that Court, and Condemnation as aforesaid, wherein he alleged, that Edmundson had in his Custody several Sails belonging to the said Ship, and that he had refused to deliver them to the Marshal of the Court, after Monition given, &c. and therefore prayed an Attachment, which was accordingly awarded against him (Edmundson) to arrest and imprison him quousq; he should deliver the Sails; and he was arrested and brought into that Court, but pleaded nothing, only refused to deliver the Sails.

That the Plaintiff had suggested for a Prohibition no other Matter, but that before the Seizure of the Ship, one T. S. was Proprietor of certain Sails (naming them) and was indebted to the Plaintiff in 400 l. and for that Debt pawned the Sails to him quousq; &c. and that the Money is not paid to the Plaintiff.

And it was insisted, that this Matter was a good Plea in the Admiralty-Court, and ought to have been pleaded there; and that there is no Cause for a Prohibition until the

See Hilde-
brand's Case.

1 Roll. Rep.

285. 1 Roll.

Abr. 532.

Nº 40.

the Plea is refused by that Court, which the Plaintiff hath not suggested.

And the Court was of that Opinion, that the Admiralty had not meddled in any Thing but where they had a proper Jurisdiction; for it did not appear by the Suggestion, that Edmundson had made any Claim of Property in that Court, and therefore there was no Reason to prohibit them; but if he had offered a Plea of this Matter in that Court, and they had refused to allow it, and still had proceeded against him, this would have been a good Ground for a Prohibition; and afterwards the Suggestion being mended, by adding a Refusal of this Plea, a Prohibition was granted; quod nota.

Chetle versus Lees.

THIS was a Motion to amend a Judgment by striking out Capiatur and inserting Misericordia; and a Writ of Error being brought on this Judgment, and pending the said Writ, this Motion was made to amend the Judgment.

And now two Rules were produced, one between * Linch and Lucy, when Pemberton was Ch. Justice, where the Judgment was amended in this Point, (viz.) by the Entry of a Misericordia instead of a Capiatur; and the other Rule was between † Cook and Grimes, where Misericordia was struck out, and a Capiatur inserted, by the Direction of the Court.

And Holt Ch. Justice remember'd a Case between Chapman and Gale, where the Judgment against an Executor was general; and upon a Motion, the Words following were added De bonis testatoris levand'.

But in the principal Case, the Court would make no Rule to amend.

Curia.

4 Mod. 6.
2 Lev. 22.
The Entry
of a Misericordia instead
of Capiatur,
not amended.

* Mich. 34
Car. 2.
Rot. 486.

† 36 Car. 2.
Rot. 314.

D E

Term. Sanct. Hill.

2 & 3 Willi' & Mariæ, B. R.

Prohust's Case.

Mandamus
not granted
to restore a
Fellow of a
College,
without ap-
pealing to a
Visitor.

MAndamus to restore Prohust to the Place of Chaplain of All-Souls College in Oxon, being turned out by the Warden of that College.

And it was granted upon Suggestion, that the Archbishop of Canterbury was Visitor of the College, and the See being now Vacant by the Deprivation of the Archbishop, by Virtue of the Act of Parliament which enjoins the Oath of Allegiance; and for that Prohust had no other Remedy, because the Dean and Chapter of Canterbury, who are Guardians of the Spirituality sede vacante, have refused to intermeddle with this visitatorial Power by Way of Appeal.

Raym. 31,
100, 101.
Sid. 71.

But at another Day, it was shewn in Behalf of the College, that the Dean and Chapter of Canterbury, and not the Archbishop, are Visitors of this College, because they were created, and stand instead of the Prior and Convent of Canterbury, who were Visitors heretofore; and farther, that they were ready to hear the Appeal.

Whereupon the Court discharged the first Rule, and ordered Prohust to apply himself by Way of Appeal.

Lee's Case.

LEE, one of the Proctors of Doctors Commons, moved for a Mandamus to restore him to his Office of Proctor, suggesting, that the Dean of the Arches had made an Order to bar him from practising there, until he submitted to such an Assessment (which he suggested to be unreasonable) and until farther Order, &c. and the Mandamus was granted de bene esse only.

3 Mod. 332.
3 Lev. 309.
Mandamus
will not lie to
restore a
Proctor to
his Office.

And thereupon it was returned, that the Doctors and Proctors were a voluntary Society, &c. and that the Archbishop of Canterbury had used to visit them, and to redress all Gravamina arising amongst them, by Way of Appeal, and that they used to assess all the Doctors and Proctors towards common Charges, and that Lee was assessed 10 s. to a common Charge, which he refused to pay; and moreover, that such an Archbishop made an Order, that no Proctor should commence a Suit until after he had consulted a Doctor, and that Lee commenced such a Suit, &c. without Advice, per quod, &c.

And it was argued, that a Mandamus must necessarily lie in this Case, otherwise the Party grieved would be without Remedy, for that no Assize would lie of this Office.

And it may be a Question, Whether an Action on the Case will lie; but admitting that it will, yet it may be defective, because a Jury may not well compute the Damages in Proportion to the Loss of a Man's Livelihood.

A Mandamus will lie in this Case as well as for an Attorney of an inferior Court, because this is an Officer of a more publick Concern.

As to the Visitor, 'tis absurd to say, that the Archbishop is Visitor of his own Court; for the Dean of the Arches is but the Archbishop's Deputy, and therefore Lee cannot * Appeal, because that would be to appeal from the Archbishop to the Archbishop, or at least from the Deputy to the Principal.

* 4 Inst. 319.
contra.
Such an Appeal is given
by Statute 24
H. 8. cap. 12.

It was argued for the Doctors, that the Archbishop had only the Constitution of the Dean of the Arches, but that the Dean was not his Deputy, nor can the Archbishop sit there, or turn him out; 'tis like the Rector of a College in the University, who is always constituted by the Visitor; but when he is once in, he is not a Deputy, but

bath a distinct Authority, and an Appeal lies from him to the *Mistoz*.

Curia.

After Debate the Court seemed to incline, that a Mandamus would lie in this Case as well as for an Attorney; but that which was most doubted, was concerning the *Mistoz*; for they agreed, that if Lee might properly Appeal to the Archbishop as *Mistoz*, then he could have no Remedy in this Court.

* Stat. 24
H. 8. cap. 12.
Expressly to
the contrary,
but this
Statute was
not mention-
ed.

Afterwards, in Trinity Term, anno 3 Will. this Case was argued again, and then the Court agreed, that no * Appeal could be made from the Dean of the Arches to the Archbishop, because it was one and the same; but yet no Mandamus would lie, because this was an Ecclesiastical Office, and a Matter properly and only cognisable in that Court; and that the Temporal Courts are not to intermeddle or inquire into this Sentence, or into the Proceedings in any Matters whereof they have a proper Jurisdiction, but are to give Credit thereunto; Quod nota.

Lambert's Case.

Return to a
Mandamus,
not good.

Mandamus to admit him to the Office of Register of the Archdeacon of Salisbury, suggesting, that he was debite electus, and placed into the said Office.

The Return was, that Lambert nunquam fuit debite electus, and placed into the Office.

And now an Exception was taken to the Word Debite in this Return, upon the Authority of the Cases reported in Sid. 209, 210. Sed non allocatur; for the Return answers the Suggestion in the Writ; but that it had been better to have made a general Return, (viz.) Nunquam fuit electus in officium, without saying debite.

Kemp *versus* Andrews. Mich. 2 Will. & Mar.
B. R. Rot. 289.

3 Lev. 290.
An Execu-
tor cannot
be jointly
sued with
another.

TRover, &c. for certain Goods, of which the Plaintiff and A and B. were jointly possessed, and lost them, and that the Defendant found them, and that afterwards the said A. and B. died. and the Plaintiff survived, and then the Defendant converted them to his own Use.

The

The Defendant pleaded, that the Plaintiff and A. and B. were Joint Merchants, and that they were possessed of these Goods as Merchants, and that by the Law of the Land there is no Survivorship between Joint Merchants, and concluded in Bar.

See 2 Lev. 188, 228. the Bill was abated, it being by the Survivor alone.

And upon Demurrer to this Plea, it was argued, that this Action is well brought by the Survivor alone, because the Action must necessarily survive, tho' the Interest doth not; otherwise there would be a Failure of Justice, because the Survivor and the Executors of those who were dead cannot join in the Action, for that their Rights are of several Natures, and there must be several Judgments.

* 3 Leon. 354. 1 Inst. 21. Reg. 135. d. 2 Sand. 124. b.

Besides 'tis clear, that this is not a Plea in Bar, as 'tis pleaded here, and of that Opinion was the whole Court; and so the principal Point, viz. the Gift of the Action was not adjudged.

But there is a parallel Case between † Hall and Hufam, where the Executor was joined, and the Matter supra pleaded in Abatement, and held a good Plea.

† 2 Lev. 228. That an Executor cannot be jointly sued with

another, because he is to be charged *de bonis Testatoris*, and the other *de bonis propriis*.

Rich Sir Peter *versus* Pilkington, Lord Mayor of London.

ACTION on the Case for a false Return of a Mandamus, in which Action the Plaintiff declared, that he was lawfully elected into the Office of Chamberlain of London, and that the Defendant refused to admit him into that Office; whereupon he brought a Mandamus directed to the Defendant, and the Aldermen, &c. and the Defendant returned, that the Plaintiff nunquam fuit Electus to the said Office, ubi revera he was lawfully elected by the Mayor, &c.

After a Plea in Abatement, there must be no Exceptions to the Declaration.

The Defendant pleaded in Abatement, that the Mayor and Aldermen of London are a Corporation, and that all of them in their judicial Capacity in a Court of Aldermen jointly made the said Return; and thereupon prayed Judgment of the Bill brought against the Mayor alone.

And upon a Demurrer to this Plea, it was adjudged ill, for this Action is founded on a Tort, and therefore it may be either joint or several, at the Election of the Party, as in Trespass, &c.

Z 2

But



But it was objected, that the Mandamus was directed to all, (viz.) to the Mayor and Aldermen, &c. and therefore it would be injurious to the Mayor, for it might be, that he voted for the Plaintiff against the Return, and was over-ruled by the Majority to make this Return.

To which it was answered, and so resolved by the Court, that the Mayor and Aldermen are not a Corporation, but they are a Court, which is nothing to this Purpose.

And as to the other Matter, if the Fact is so, that the Defendant was over-ruled by the Majority, and contrary to his Will, this would have been Evidence upon Not guilty pleaded, and being proved, the Plaintiff would have been Nonsuit.

Then the Counsel for the Defendant would have taken Exceptions to the Declaration, but the Court would not allow it; because here was a Plea in Abatement, to which the Plaintiff might have demurred; and for that Reason he shall never take Exceptions to the Declaration; to which the Counsel replied, that it appeared by the Plaintiff's own Shewing, that he had no Cause of Action at the Time when this Action was brought.

For the Return of the pluries Mandamus is laid to be after the Beginning of Michaelmas-Term, and the Memorandum of the Bill is entered generally of that Term; and that this was such a Fault, that they might shew as Amicus Curiae; and thereupon the Plaintiff prayed to amend, which was granted, and Judgment was given; quod respondeat ouster.

Clobery versus Bishop of Exon.

The Plaintiff cast an Essoin, and had a Day till such a Day; but did not say *idem datus est* to the Defendant, which is Error.

Quare Impedit in C. B. and at the Return of the Summons the Sheriff returned, that the Bishop was summoned, and the Entry on Record was, that the Bishop appeared on the Day per T. S. attorn' suum & quod fecit se essoniri, &c. & habuit diem per essonium suum usque such a Day, ad quem diem Episcopus comperuit, and the Plaintiff primo die placiti exactus made Default; and thereupon Judgment of Nonsuit was against the Plaintiff.

And upon a Writ of Error brought the following Errors were assigned.

First, That this Essoin was absurd, because the Defendant appeared at the same Time, and the Nature of an Essoin is to excuse an Appearance.

(2.) That there was no *idem dies datus* to the Plaintiff upon this *Essoin*, and for that Reason 'tis discontinued.

(3.) That the Plaintiff was demanded *primo die placiti*, whereas it ought to have been *quarto die post*, for he is not demandable before that Time.

'Tis very true, that an *Essoin* after Appearance is absurd, but that cannot be assigned for Error, because 'tis only Dilatory, and the Granting a Dilatory when it ought not to be granted is no Error; but 'tis otherwise to deny it when 'tis grantable. See *Beecher's Case*: They all agreed, that there ought to have been *idem dies datus* to the Plaintiff; and per Holt Chief Justice, that as to the Demand *primo die placiti*, the Difference is thus; that the Defendant or Tenant is not demandable, but upon the *Quarto die post*, but the Plaintiff may be demanded *primo die placiti*, and for Non-appearance may be nonsuited. Curia.

And the Court held, that this was a Nonsuit before Appearance, and therefore would be no Bar in another Action; the Judgment was reversed for the second Error.

Sir Thomas Earle's Case.

MAndamus to be restored to the Office of Common Council-Man of the City of Bristol, and upon the Pluries the Mayor and Burgesses of that City made this Return.

It That Bristol was an ancient Borough Time out of Mind, and the Burgesses and Inhabitants were a Body corporate, by the Name of the Mayor and Burgesses of the Vill of Bristol, until the fifth Day of June, Anno 34 H. 8. when that King erected the Borough into a City, and thereby granted that from thenceforth it should be a Body corporate, by the Name of the Mayor, Burgesses, and Commonalty of the City of Bristol; and that Time out of Mind in the old Borough, and now City aforesaid, there hath been a Mayor and Council consisting at least of Forty Burghers, besides the Mayor, and that he for the Time being, and the Council, or the greater Part of them, had during all that Time used for any reasonable Cause to displace any one of the Council aforesaid, as often as Occasion required, and in his stead so displaced to choose another of the Inhabitants and Burghers.

Objections to the Return of a *Mandamus* to restore a Man to the Office of a Common Council-Man of Bristol.

And

And that every Person chosen to be of the said Council, have for all the Time aforesaid used, before his Admission into the Office, to take an Oath before the Mayor for the Time being, That he will be true and faithful to the King, his Heirs and Successors, and to the Mayor and Common Council of the City; and that he will come upon the Mayor's Summons to the Guild-Hall, and to any other Place within the Franchise of the City, unless he hath a reasonable Cause to the contrary; and that he shall give Counsel according to his Knowledge, and not give any partial Counsel for any Favour or Affection in any Matters concerning the Mayor and Commonalty, or the common Profits of the City; and that he shall keep secret all Matters secretly debated amongst them, and which ought to be kept secret, and shall maintain to his Power the common Profit of the City, and shall give the best of his Counsel concerning the same without Favour or Affection.

That Sir Tho. Earle was (on such a Day) chosen Common Council-Man, and took the Oath aforesaid, and was admitted accordingly, and for Cause of Amotion, they certified three Things.

(1.) That he not weighing his Oath aforesaid, nor regarding the common Profit of the City, but designing to draw one Sir Richard Hart (then Mayor) and other good Citizens into the Displeasure of the King and Queen, on such a Day fabricavit & scripsit quendam Epistolam to the Earl of Shrewsbury then Secretary of State, in which Letter inter alia mendacia & contumelias charged on the said Mayor, he the said Sir Tho. Earle charged the said Mayor with Subornation of a wicked Fellow to swear any Thing in which he should be instructed, and thereby the said Secretary of State would have great Trouble whilst Arthur Hart continued Mayor; and that those Citizens which were of the Mayor's Party were zealous Jacobites; and that the said Mayor intended to baffle the next Election for Members of Parliament, ubi revera the said Sir Richard Hart is a true and faithful Subject of the King and Queen, and never guilty of any Subornation.

(2.) That Thomas Earle on such a Day, when the Mayor and Aldermen were on the Tolsey-Court in Discharge of their Office, riotose & manu forti cum magna multitudine hominum entered, and insolently threatened the said Mayor and Aldermen for bailing one Francis Moor, who was committed

mitted for seditious Words, and that the Clamour and Riot was so great, that the Mayor and Aldermen there present were in Fear of their Lives, and thereby forced to remand the said Fra. Moor to the Gaol after they had bailed him, ubi revera the said Francis was bailable by Law.

(3.) That the said Sir Tho. Earle, and others of the Common Council, on such a Day, in their military Capacity, as Deputy-Lieutenants, did require the Common Council-Book to be brought before the Earl of Macclesfield, Lord-Lieutenant of the said City, with an Intention to make an Accusation against the said Hart, then Mayor, &c. and to betray the Secrets of the City, and to reflect upon the Government thereof, and to draw in Question the Proceedings of the Mayor and Council, before a Person who had no Conusance of the Matters, contra Officii sui debitum & contra sacramentum suum.

And they farther certify, that the aforesaid Matters were reduced into Writing in three Articles against the said Sir Tho. Earle; and that at a Common Council held such a Day before Sir John Knight, then Mayor of the said City, the Articles aforesaid were produced and read; the said Sir Tho. Earle, then and there being present, super quo an Order was made by the Mayor and Common Council of the City aforesaid, that the said Sir Tho. Earle should have a Copy of the said Articles, and should make an Answer to them at the next Council-Day; and afterwards at a Common Council held on such a Day before the same Mayor, another Order was made, that the said Sir Tho. Earle should have farther Day to answer until the next Council-Day after:

And that at the said next Council-Day, held on such a Day before the said Mayor, the said Sir Tho. Earle was requested by the Mayor and Council to answer the Matters in the said Articles alledged; and because the said Sir Tho. Earle (then appearing) made no sufficient Answer thereunto, it was then and there ordered by the said Mayor and Council of the said City, that the said Sir Tho. Earle should be removed and discharged of his said Office, and for the Causes aforesaid they cannot restore him.

(1.) It was objected, that this Return was insufficient as to the first Article, (viz.) That the Matter therein contained is no Ground for a Disfranchisement, or if it was, 'tis not sufficiently alledged; for 'tis only said, that Sir Tho. Earle wrote such a Letter, but not that it was ever sent abroad

Objection to
the Return.

abroad or published; and the Writing alone, if never published, cannot be any Scandal.

(2.) Then as to the second Article, 'tis altogether incertain, for 'tis only alledged generally, that he threatned the Mayor and Aldermen; and it doth not appear by the Return, that there are any Aldermen in Bristol, or that he used any Force in particular, and the Consequence alledged is very trivial, (viz.) the Occasioning a seditious Fellow, bailable (as they pretend), to be remanded to Gaol.

(3.) The third Article is more trivial, for nothing more is pretended by it than a Request made by Sir Tho. Earle to bring the Common Council-Book before the Lord Lieutenant, &c. intentione, &c. which Request was never granted; and for ought it appears to the contrary, this Request might have been made by the Majority of the Common Council; and all that Matter which follows these Words &c. intentione, as they have laid it, is no more than an Innuendo, which makes nothing to the Purpose.

Then it was insisted, that there cannot be any Cause to disfranchise a Member of a Corporation, unless it be for such a Thing done, which works to the Destruction of the Body Corporate, or to the Destruction of the Liberties and Privileges thereof, and not any personal Offence of one Member to another.

And of the same Opinion was the whole Court; whereupon Sir Tho. Earle had a peremptory Mandamus to restore him, the Causes returned being altogether insufficient to remove him.

Alstone *versus* Hutchinson.

Trespass for carrying away his Goods; the Defendant justified as in his Freehold, no good Plea.

5 H. 6. 28. b.
19 H. 6. 20. a.
2 Cro. 141.

TRespass for Taking and Carrying away his Trees. The Defendant pleaded the common Bar, (viz.) That the Place where the Trespass was supposed to be done, is his (the Defendant's) Freehold, and so justifies as in his Freehold, &c.

And upon a Demurrer to this Plea it was adjudged ill, for this is no Plea to a Trespass de bonis asportatis, but peculiar only and proper to a Trespass quare clausum fregit; quod nota.

Tovey *versus* Pitcher. Mich. 2 Will. & Mar. Coke's Office
in C. B. Rot. 309.

Covenant, &c. by a Lessor against the Assignee of the Executrix of the Lessee, in which the Plaintiff declared, that he was possessed of two Messuages in the Parish of St. Martin in the Fields, for a long Term of Years, and that he made an Underlease thereof to one Richard Gill for 21 Years, rendering such an yearly Rent, and that by the same Deed he the aforesaid Rich. Gill did, for himself and his Assigns, covenant to pay the Rent, that the said Rich. Gill did by his Last Will constitute Susan Gill to be his Executrix, and died, and that she was possessed as Executrix, and afterwards assigned over her whole Estate to the Defendant, who entered and was possessed; and the Breach now assigned, was for Non-payment of Rent in arrear, and accrued after the Assignment of the Term.

3 Lev. 295.
S. C.
2 Vent. 234.
S. C.
4 Mod. 71.
S. C.
Shower 340.
S. C.
Covenant will not lie against the Assignee of the Executrix of the Lessee.

The Defendant pleaded in Bar, that before any Rent was due and payable, (viz. On such a Day) he had granted and assigned all his Term and Estate to one James Mott, by Actue whereof he entered, and was possessed for the Residue of the said Term.

And upon a Demurrer to this Plea, the only Point was, Whether this Assignment of the Term, without any Notice given to the Plaintiff, shall bar him from this Action, or whether the Defendant shall still continue chargeable, until the Plaintiff hath Notice of the Assignment; for it was agreed by all, that this was a good Bar, if the Plaintiff had any Notice of the Assignment over, &c.

But the Court was divided, (viz.) Pollexfen Ch. Just. and Rokeby held clearly, that the Defendant ought in his Plea to have set for: h Notice given to the Plaintiff of this Assignment, otherwise this Inconveniency would ensue, (viz.) The Lessor would be defeated of his Action of Covenant; for by such secret Assignments he may never find the Tenant of the Lands against whom to bring his Action.

Therefore 'tis convenient, that where a Termor assigns and would discharge himself of the Covenant, that he ought to give Notice thereof to him in Reversion, and for this Purpose the Cases in the * Margin were cited.

1 Bull. 44.
Roll. Rep.
314.

2 Ed. 4. 3. 3 Cro. 64. 2 And. 90. 3 Leon. 95. 2 Cro. 334, 392, 398. Raym. 162, 303. Sid. 338.

A a

But

* 3 Rep. 16.
Spencer's
Case.

But Justice Ventriss and Powell were of a contrary Opinion, (viz.) That the Plaintiff was bound to take Notice of the Assignment, &c. at his Peril, because this Action is founded merely upon the Privy of * Estate, and not upon any Privy of Contract; and here by the Assignment over of the Term, all the Privy of Estate between the Plaintiff and the Defendant is gone and destroyed ipso facto, and by Consequence this Action which depended on such a Privy is also gone; and if so, then this Bar is good, without alledging any Notice given to the Plaintiff.

The Court being thus divided, the Cause was adjourned to Easter-Term following, before which Time Justice Ventriss died, and afterwards, (viz.) in Easter-Term, the Plaintiff had Judgment by the Opinion of two Judges, as aforesaid.

But upon a Writ of Error on this Judgment in Easter-Term, 4 Willielmi, per Holt Ch. Justice and Two more, the aforesaid Judgment was reversed: Upon the Point in Law, they being of Opinion, that the Assignee was not bound to give Notice to the Lessor, but that the Assignment was compleat without Notice, and by Consequence the Defendant was discharged of all the Rent accrued after the Assignment.

See 3 Lev. 233. Covenant against the Lessee after Assignment of his Term, brought upon an express Covenant for Non-payment of Rent, and held good; and that the Accepting the Assignee as Tenant, did not hurt.

Bennett *versus* Gandy.

Bargain and Sale, nothing passes before Enrollment.

IN Ejectment brought by the Assignees of Commissioners of Bankrupt, upon the Bankruptcy of Alderman Backwell of London, in which these Assignees were Lessors of the Plaintiff in Ejectment; and a special Verdict being found, which was now to be argued:

The Attorney General Trevor interrupted the arguing it, for that the Verdict had abated the Declaration; for it appeared by the Verdict, that the Demise to the Plaintiff, upon which this Ejectment was brought, was made by the Assignees of the Bankrupt before the Enrollment of the Bargain and Sale, by which the Commissioners had assigned the Lands to the Lessors of the Plaintiff; and tho' the Enrollment

rollment of a Deed shall relate to the Delivery of the same Deed to avoid Mesne Incumbrances; yet every Bargain and Sale before Enrollment is void, and cannot be made good by any Relation, because the Bargainee hath no Estate before Enrollment, and if so, he could not grant any Estate; and here it appears, that the Lessors of the Plaintiff had not any Title at the Time of the Demise, upon which the Plaintiff declared.

And the Court held this to be a fatal Exception, and thereupon the Arguing this Cause was rejected; then the Court was moved for Leave to amend the Declaration by altering the Time of the Demise, sed non allocatur, for if the Time was altered, this would make it a new Demise.

2 Cro. 52,
408.
Cro. Car.
109.
Hob. 136.

The like
Judgment in
Point was gi-
ven in a spe-
cial Verdict.

1 Vent. 360.

*in the case of
Herry v. Bowles
v. Bowles
B. R. 179.*

Coan *versus* Bowles.

THE Plaintiff in Replevin was Nonsuit, and upon a Writ of Error brought in B. R. the Judgment was affirmed; and now the Court was moved, that the Defendant in the Writ of Error might have Costs upon the Statute pro dilatione Executionis, &c. for tho' the Writ of Error was brought by the Plaintiff in the original Action of Replevin, yet the Avowant is as much a Plaintiff as he, and had a Judgment for a Return habend', the Execution of which Judgment was delayed by this Writ of Error, &c. and therefore not like the Cases where the Plaintiffs in other Actions bring Writs of Error, for here is no Delay of Execution, because the Defendant had no Judgment.

When the
Avowant
shall not
have Costs
upon a Writ
of Error.

But adjudged per Curiam, that the Defendant in the principal Case should not have Costs, because he is not within the Letter of any of the Statutes, which Statutes shall never be extended beyond the Letter, but shall be taken strictly, because Costs are in Nature of a Penalty.

Cro. Car.
401, 425, 533.
March 28.
Curia.

And per Holt Chief Justice. In an Avowry for an Amerciament, if the Plaintiff is nonsuited, or there is a Verdict against him, yet the Avowant shall not have Costs.

Philips versus Bury ; otherwise Doctor Bury's Case.

Judgment given in B. R. for the Defendant which was reversed on a Writ of Error in Parliament; the new Judgment must be given there, and not in B. R.

THE Doctor being Rector of Excester College in Oxford, was deprived by the Bishop of Exon' as Assistant, &c. and one Painter chosen to succeed him in that Rectorship, but the Doctor keeping Possession of the Rector's Lodgings in the College, an Ejectment was brought, in which the Plaintiff declared generally upon a Demise of the Rector and Scholars of the College, &c.

And now the Court was moved in behalf of Dr. Bury, that the Declaration might be altered; for certainly a Lease made by the Rector and Scholars generally is not good; and here 'tis intended to try the Right to the Rectorship, which can never be done upon this Declaration.

Whereupon the Court ordered, that the Declaration should be altered, and that the Demise should be laid to be made by Painter Rector of Excester College, and the Scholars of the same:

And that the Defendant might plead specially, setting forth, that he is and was Rector, &c. at the Time of the Demise, and traverse that Painter was Rector tempore dimissionis factæ, and by this Means the Right of the Rectorship would come in Question.

Afterwards in Michaelmas-Term, Anno 6 Willi' upon a special Verdict found in Ejectment, Judgment was given in B. R. against the Plaintiff Painter; and upon this Judgment a Writ of Error was brought in Parliament, (the Suit being in B. R. by original, and not by Bill) and there the Judgment of B. R. was reversed, and the Record of the Reversal being remitted into B. R. it was moved for the Plaintiff (Painter) that the Court of King's Bench would give a new Judgment, (viz.) Quod quer' recuperet; and for this the Case of * Faldo and Ridge was cited; and it was insisted, that unless the Court would give such Judgment, there would be a Failure of Justice; for that the House of Lords had only a Transcript of the Record, and had no Rolls to enter any Judgments.

But per Curiam, this cannot be done; for it would be absurd for this Court to give a new Judgment contrary to that which they had already given; and that it belonged to

* Yelv. 75.
2 Cro. 206.
2 Roll. Abr.
774.

to the same Court to give the new Judgment, where the former Judgment was reversed.

And in the Case of Faldo and Ridge *supra*, the Court of Exchequer-Chamber, after the Reversal, &c. gave Judgment, *quod quer' recuperet*, &c. but because they wanted Power to award a Writ of Inquiry which was necessary in that Case, being on a Demurrer; therefore it was sent back into B. R. for the Execution of that Writ, and thereupon to give final Judgment for him.

But 'tis otherwise where the Judgment is against the Plaintiff in B. R. upon a special Verdict, and that Judgment reversed in the Exchequer-Chamber, for in that Case there being no Writ of Inquiry requisite, the Court of Exchequer-Chamber doth not only give Judgment of Reversal, but a compleat Judgment for the Plaintiff in the Action, (*viz.*) *quod recuperet*, &c. and for this Diversity the Cases in the * Margin were cited.

* Dyer 343,
373.
4 Inst. 72.
Yelv. 118.
F. N. B.
19. d.
2 Sand. 224,
234, 235.

And hereupon the Court of B. R. was of Opinion, that they could not give a new Judgment in this Case.

Afterwards the Plaintiff resorted to the Parliament again, and there upon Debate in the House of Lords, a new Judgment was given *quod quer' recuperet*, which was entered up accordingly, and executed.

The City of London versus Clerke, & Maltman.

IN an Action on the Case, the Plaintiffs prescribed to have a Farthing for every Quarter of Malt brought by any of the West-Country Barges to London.

Upon the general Issue pleaded, there was a Trial at Bar, at which Trial the Plaintiffs offered in Evidence four several Verdicts obtained at the Nisi prius against four West-Country Maltsters; and it was debated whether these Verdicts should be admitted as Evidence against the Defendant who was neither Party or Privy to those Records.

And per Curiam, they shall be given in Evidence, for 'tis as reasonable, that a Recovery against a Stranger should be given in Evidence, as Payment of the Duty should be proved by other Strangers, which was never yet doubted; and thereupon this Evidence was admitted.

And per Holt Chief Justice. If a Lord of a Manor claims Suit of his Tenants *ad molendinum* by Custom, &c. and in an Action recovers against one Tenant, that Recovery may

Where a Verdict shall be given in Evidence against one who was neither Party or Privy to the Suit.

may be given in Evidence in a like Action to be brought against other Tenants upon the Reason *supra*, unless the Defendant can shew any Collusion or Collusion between the Parties in the first Action, &c. *quod nota*.

Barker versus Damer. Hill. 1 & 2 W. & M.
B. R. Rot. 635.

3 Mod. 336.
S. C.
Salk. 80. S. C.
Shower 191.
S. C.
Action of
Debt for
Rent against
an Assignee
of a Term
is local,
and so is an
Action of
Covenant against
such an Assignee,
because 'tis
founded on
the Privity
of Estate.

Covenant, &c. upon an Indenture of Lease of Lands in Ireland, which was now brought by the Grantee of the Reversion against the Assignee of the Lessee upon an express Covenant for Payment of Rent reserved to be paid at London, and the Breach assigned was for Non-payment of Rent.

The Defendant pleaded to the Jurisdiction, (*viz.*) that the Lands demised, and out of which the Rent is reserved lay in the Kingdom of Ireland, &c. and upon a Demurrer to this Plea,

It was argued for the Plaintiff, that there was an express Covenant to pay the Money in London, upon which Covenant this Action is grounded; therefore since the Payment is to be made here, that alone without any Thing more will be sufficient to draw the whole to the Jurisdiction of the King's Court here; like the common Case where Part is done upon the Land, and Part upon the Sea, that which is done on the Land, is sufficient to draw the whole Jurisdiction from the Admiralty, to the Courts of Common Law.

Besides, it appearing by the Bill, that the Defendant is in Custodia Mareschalli, that will be enough to give Jurisdiction to this Court, and if this Court hath not Jurisdiction, there will be a Failure of Justice, because the Person remains here in England, when his Lands are in Ireland; so that the Plaintiff cannot have his Action in Ireland, for Want of the Person, nor here for Want of the Lands; which will be very inconvenient.

If it should be doubted whether an Action of Covenant will lie against the Assignee of a Lessee (after the Term is determined) upon an express Covenant, the Cases in the * Margin prove that it will; and this shews that the Action is not founded alone upon the Privity of Estate, but that it hath a Respect to the † express Contract.

* 2 And. 138.
Sid. 157.
† Noy 141.
2 Cro. 142.
1 Inst. 26.
2 Roll. Aba
571.
3 Keb. 150.

This Action brought by the Grantee of the Reversion against the Assignee of the Term, is in its Nature local, because 'tis founded merely on the Privy of Estate, for by the Assignment of the Term, the Privy of Contract was wholly determined.

Econtra.

'Tis adjudged in several of our Books, that an Action of Debt for Rent against an Assignee of a Term, is local, and will lie no where, but in that County where the Lands are.

Cro. Car. 183.
Litch 197.
W. Jones 43.
Hob. 37.

And the same Reason holds in Covenant against the Assignee; for this Action as well as that of Debt is maintainable only upon the Privy of Estate, and the Defendant is merely charged thereby, because 'tis a Covenant which runs with the Land; for if it had been a collateral Covenant, the Assignee would not have been bound by it, and that proves the Action is local only with Respect to the Land.

Nota; It was agreed by all, that the * Grantee of a Reversion may maintain an Action of Covenant against the Lessee himself, as well in the County where the Demise was made, as in the County where the Lands lie, because the Privy of Contract between the Lessor and the Lessee is transferred to the Grantee of the Reversion by the Statute of H. 8, &c.

* 3 Lev. 233.
seems to the contrary.
1 Saund. 238.
3 Lev. 154.

1 Saund. 240.

The Court inclined against the Plaintiff, for that they did not apprehend any Difference (as to this Purpose) between an Action of Covenant and Debt.

Cudmore *versus* Honywood. Mich. 2 Will. & Mar. B. R. Rot.

IN an Action of Debt for a Pain assessed in a Court-Baron, and now brought by the Lord of a Manor against the Defendant, who was a Copyholder of Inheritance; the Plaintiff declared, that he is, and for twenty Years last past, hath been Lord of the Manor of Coggeshall in Essex, and seised in Fee thereof; and that the Defendant is, and on the first Day of May, 1688. and before was, one of the customary Tenants of the said Manor, (viz.) of a customary Messuage in the Parish of Morkeshall in the County aforesaid, Parcel of the Manor aforesaid, and held by Copy of Court-Roll of the said Manor in his Demesne as of Fee, at the Will of the Lord, according to the Custom of the Manor:

Action of Debt will not lie by a Lord of a Manor against his Copyhold Tenant, for a Pain assessed by the Homage for an Encroachment on the Waste.

Presentment
by the Ho-
mage.

Manor: And whereas the Defendant, on the said first Day of May, unto the 8th Day of September, 1690. had continu- ed and maintained an Encroachment upon the Waste of the Plaintiff, Lord of the Manor in the Parish aforesaid, and within the said Manor nuper antea fact', by the Creation of 7 Perches of Pales and Plantation of Whitethorne Hedge, before the said customary Messuage, per quod at the Court- Baron of the Plaintiff, Lord of the Manor aforesaid, held such a Day at the said Manor before A. B. C. Justices of the said Court, by the Homage of the Manor, then and there impanelled and sworn, (viz.) I. D. T. N. and R. S. presentat. fuit, that the Defendant had continued and maintained the Encroachment aforesaid; and the said Ho- mage then and there in the same Court, according to the Custom within the said Manor, Time out of Mind, &c. imposuerunt poenam 5 l. in & super (the Defendant) per eum Domino Manerii prædict. solvend. nisi ipse (the Defen- dant) before such a Day should remove the Encroachment, vel aliter (with the Plaintiff) Domino Manerii præd. in ea parte agreearet, of which the Defendant had Notice indilate, (viz.) on the same Day; and the Plaintiff in factio dicit, that the Defendant hath not removed the Encroachment a- fforesaid, but that he hath maintained and continued the same, nec cum eodem (the Plaintiff) Domino Manerii præd. in ea parte aliquantulum agreeavit per quod 5 l. prædict. became for- feit and payable to the Plaintiff, by Reason whereof actio accrevit, &c.

The Defendant pleaded Nil debet per legem, but at the Day assigned for performing his Law, he made Default.

And now it was moved in Arrest of Judgment, that this Action would not lie, because 'tis against Law to assess such an unreasonable Pain upon any Tenant for a private Tres- pass against the Lord; for in such Case he ought to take his Remedy by Way of Action, and not to have it present- ed as a Nuisance; besides, he ought to have laid a Usage Time out of Mind for him, &c. so to do, because 'tis against common Right.

1 Lev. 242.

For the
Plaintiff.

* Kitchen
55, 57.
12 H. 4. 8. b.
F.N.B. 75. E.

Bro. Leet 37.
1 Roll. Abr.
544.

But for the Plaintiff it was insisted, that this was the common Usage throughout the Realm, and that it was one of the Articles with which the Homage are charged, (viz.) To Inquire of Encroachments and Concealments, as ap- pears by the Books cited in the * Margin.

And Co. Entr. 118. was cited to maintain this Action, where there is a Precedent of the like Nature.

The Court seemed to incline against the Action.

D E

Term. Paschæ.

3 Will. & Mariæ B. R.

Treverton *versus* Hicks.

Replevin, in which the Plaintiff declared, that the Defendant unjustly took and detained two Hares and twenty Sheep of him (the Plaintiff) apud St. Merrin, in the County of Cornwall, in quodam loco ibidem vocat. the Cross-Park.

Pleadings in
Replevin,
not good.

The Defendant, as Bailiff to one Edward Arundell, made Conusance of the Taking, &c. in this Manner :

¶ That the Place where, &c. continebat in se viginti acras terræ quodq; diu ante prædictum tempus quo, &c. quidam Marcus Silly Ar. fuit seiscitus de & in quibusdam Mes-suagiis terris & tenementis jacen. & existen. in St. Minver St. Breock St. Ervan & St. Merrin prædict. & alibi in prædict. Com. Cornub. unde prædictus locus in quo, &c. est & prædicto tempore quo, &c. necnon a tempore cujus contrarii memoria hominum non existit fuit parcell. in dominico suo ut de feodo; and being so seised, granted by Deed a Rent-charge of 20 l. per Annum to the said Arundell, during his Life, out of all his Lands and Tenements, with a Clause of Distress; and the Rent being in arrear, &c. he distrained, &c.

The Plaintiff pleads in Bar, protesting against the Grant; he traversed, that the Locus in quo, &c. is Parcel of the Lands and Tenements lying in the several Parishes & alibi verbatim, as 'tis in the Conusance, and thereupon

B b

the

the Defendant tendered an Issue, (viz.) That the Locus in quo, &c. is Parcel of the Lands, &c. modo & forma as be alledged.

For the
Plaintiff.

And upon a general Demurrer it was objected in the Behalf of the Plaintiff against this Conulance, for that the Plaintiff and Defendant did not agree in the Place where the Cattle were taken; for the Plaintiff says it was in the Cross-Park in St. Merrin; but the Defendant says, that the Locus in quo, &c. was Parcel of divers Messuages, Lands and Tenements lying in several Parishes, ut supra, and therefore he ought to traverse the Supposal in the Declaration, because it amounts to a Plea in Abatement, (viz.) of the Taking in another Place; for in * Replevin both the Will and the Place where, &c. are traversable.

* Hob. 16.

Another Exception was, that the Defendant did not distinguish the particular Lands and Tenements, and in what single Parish they severally lay, of which the Locus in quo was Parcel, so that a single Issue might arise; but had pleaded generally, that it was Parcel of Lands lying in several Parishes; and the Issue being Parcel or not Parcel, which is local, there wants a certain † Venue to try it.

† 2 Cro. 261.
Moor *versus*
Hawkins.
Yelv. 181.

Curia.

But per Curiam, as to the first Exception the Conulance is good, because in that Matter the Defendant agreed with the Plaintiff, by his saying, that the Place where the Cattle were supposed to be taken is twenty Acres of Land.

And as to the second Exception, three Judges held, that the Pleading was well, for the Locus in quo shall be taken to be Parcel of the Lands in St. Merrin only, and the Venue shall arise from thence.

But Holt Ch. Justice was of a contrary Opinion, and that it was uncertain and ill pleaded, and contrary to all the Forms in such Cases; and he took another Exception to it, because it was laid, that the Locus in quo is and was Time out of Mind Parcel of the Lands of Mark Silly, which is impossible, for no one Man can have Lands Time out of Mind.

And hereupon the Defendant perceiving the Opinion of the Court to incline against him, prayed Leave to amend his Conulance, which was granted, and the Plaintiff to have Liberty to answer de novo.

Carter *versus* Davis. Hill. 2 & 3 W. & M.
Rot. 128.

IN an Action on the Case, the Plaintiff declared upon two Promises, &c. Salk. 218.

The Defendant pleaded quoad the first Promise non assumpsit generally, and quoad the other Promise, he pleaded a frivolous Plea, and concluded in Abatement, (viz.) petit judicium de Billa; thereupon the Plaintiff demurred in Form as to a Plea in Bar, and so concludes with petit judicium & damna sua.

The Defendant joins in Demurrer, and concludes likewise in Bar; & per Curiam, the whole Plea is discontinued, because the Demurrer in Bar was no Answer to the Plea in Abatement, and a Discontinuance of Part, is a Discontinuance of the Whole; and the Rule was, that all was discontinued.

Crofts *versus* Harris. Pasch. 3 W. & M. Rot.

THE Plaintiff declared upon three Assumpsits, whereof two were special.

ff. That the Defendant being indebted to the Plaintiff in such a Sum, he in consideration inde promised to ship such a Quantity of Cotton-Wool at Antegoe, and consign it to the Plaintiff; and also whereas he was indebted to the Plaintiff in such other Sum, for Wares and Merchandizes sold and delivered, he in consideration inde promised to pay the Money to the Plaintiff, if he (the Defendant) did not ship and consign so much Cotton-Wool to the Plaintiff, &c. and the third Promise was upon a general indebitatus assumpsit, for Wares, &c. sold and delivered.

The Defendant pleaded generally as to all, (viz.) That since the said Promises, he and the Plaintiff had submitted themselves, and all Matters, &c. to Arbitrators, who made their Award, which he set forth in his Plea, and concluded in Bar, without alledging that he (the Defendant) had performed the Award on his Part.

And upon a Demurrer to the Bar, it appeared that the Award was particular as to the Cotton-Wool, and not of any other Matter, and as to that likewise it was but conditional, and therefore void.

An Award
pleaded to
several As-
sumpsits
good, and
not good.

And in arguing this Case, the following Diversities were taken by the Court to be Law.

* The Action on the Case for the same Matter.

† Dyer 75. b. Hob. 49. 50. 20 H. 6. 12. b. 6 H. 7. 11. b. Raym. 450.

ff. That an Award without Performance is a good Bar to an * Action on the Case, if the Parties have mutual Remedies against each other to compel the Execution of the Matters awarded, but 'tis otherwise if there are no mutual Remedies to † enforce the Performance, &c.

(2.) That the Award now pleaded, being but conditional, and therefore void, and by Consequence the Plaintiff having no Remedy to enforce the Performance, 'tis no Bar to his Action.

(3.) This Award being particular and only concerning the Cotton-Wool, the Defendant should have pleaded it in Bar only of those Promises concerning the said Wool, and not in Bar of a general Indebitatus assumpsit for Wares sold, but he should have pleaded non assumpsit as to that Promise, because the Award did not extend to it.

But if this Award had been general, and a good Award, the Defendant might have pleaded it in Bar of all the Promises generally, as here he had done; and that such Plea would not have amounted to the general Issue, because the Defendant, by pleading the Award after the Promises made, had admitted the Plaintiff to have Cause of Action upon the Promises, but that he was barred by the Award, and an Admission even of a Colour of Action is sufficient to prevent the Pleading to amount to the general Issue.

The Plaintiff had Judgment.

Willett *versus* Tydy. Pasch. 3 W. & M. B. R.
Rot.

Where an Officer distraining for Taxes, is sued he shall have treble Costs.

THIS was a special Action on the Case brought against the Defendant, wherein the Plaintiff declared, that the Defendant (who was Collector of the Taxes) had distrained Twenty Lambs of him (the Plaintiff) for Nineteen Shillings due to the King, &c. and that the Defendant might have sold those Lambs to T. S. for Forty Shillings, yet he Deceptive sold them for Thirty-five Shillings, and kept the Overplus of the Money, and farther declared upon a general Indebitatus Assumpsit, for Sixteen Shillings, as so much Money received by him (the Defendant) to the Plaintiff's Use.

The Defendant quoad the first Part of this Declaration pleaded Not guilty, and quoad the Promise he pleads non assumpsit.

Nota ; It was agreed by all, that this Action on the Case, and the Assumpsit were * inconsistent, and the Defendant might have demurred to the Declaration ; for it required a different and double Answer.

But the Cause being tried, and a Verdict for the Defendant, the Inconsistency of the Action could not come in Question ; but it was now moved for treble Costs upon the Statute 1 Willi.

Sed per Curiam, the first Part of the Declaration will not draw treble Costs, because the Action was not for distressing for the Tax, for that was admitted to be good, but for not selling the Distress at the best Price ; and for detaining the Overplus after it was sold, which is neither within the Letter or Intent of the Statute ; for that respects such Matters only which are done by the Officers in levying the Tax, according to the Course of Law, and not to any collateral Matters of Fraud as in this Case.

But because the Plaintiff had also declared upon a general indebitatus assumpsit, for so much Money in certain, and the Judge of Assise had certified on the Postea, that the Defendant's Justification as to all was as Collector of the Royal Aid, by Virtue of the Statute 1 Willi. therefore for that Reason only the Court was of Opinion, that the Defendant should have treble Costs ; secus if the Action had been single upon the first Matter only.

* Trover and Assumpsit are ill, tho' the Defendant was acquitted of the Trover.
3 Lev. 99.

3 Lev. 228.

Temple *versus* Killingworth.

CASE, &c. in which the Plaintiff declared, that the Defendant at such a Time had maliciously levied a Plaintiff in London, and prosecuted the Plaintiff thereon, ubi revera the Cause of Action did arise in D. in Kent, out of the Jurisdiction of the Court of London.

Cause for prosecuting a Plaintiff in London, when the Cause of Action did arise out of the Jurisdiction.

Action ; this ought to have been pleaded, and if the Plea had been refused, then a Prohibition would have been granted ; so Case would not lie.

Upon Not guilty pleaded the Parties were at Issue, and the Plaintiff had a Verdict ; and now it was moved in Arrest of Judgment, that an Action would not lie upon this Matter,

Matter, for that the Plaintiff might have pleaded it to the Jurisdiction of the Court, and if they had refused such Plea, he might have suggested the whole Matter; and thereupon a Prohibition would have been granted either by this Court, or by the Court of Common Pleas, according to the common Practice now in Use.

Holt Chief Justice and the Court inclined to that Opinion, and thereupon the Judgment was stay'd until the Plaintiff should move it again; and afterwards it was moved for Judgment, and the Cases in the * Margin were cited to maintain this Action.

* Hob. 205.

2 Cro. 667.

3 Cro. 628, 836. Stat. 3 Ed. 1. cap. 38. Register 98. F. N. B. 45. f. 1 Sand. 221.

1 Sid. 463. 4 Rep. 14. b. Keilway 106. a. 10 Rep. the Case of the Marshalsea. Fitz. Abr.

Estoppel 18. 7 H. 6. 45. 1 Vent. 369. Hudson *versus* Cook. Trin. 27 Car. 2. Smith *versus* Fuller.

But the Court was not satisfied with the Action.

D E

Term. Sanct. Trin.

3 Willi. & Mariæ, in B. R.

Paine *versus* Partrich. Pasch. 2 W. & M. B. R.
 Rot. 43.

CASE, &c. in which the Plaintiff declared, That the Vill of Littleport in the Isle of Ely was an ancient Vill, Time out of Mind, and for all that Time within the said Vill there had been an ancient River called Wilney River, and an ancient Passage over the same to the North-east Side of the said Vill, pro transitu & transportatione subditorum hujus regni Angliæ trans & ultra Rivum illum transire volen. from a Place called Ferry-lane, to a Place called Adventurous Bank, on the other Side of the River antroorsum sive retrorsum ad eorum libitum for the Passage of Horses, &c. and that the Passage aforesaid, for all the Time aforesaid, to such a Day, had been in a Ferry-boat maintained by the Proprietors and Occupiers of the Passage, and that they and the Keepers thereof had, for all the Time aforesaid, used to receive of all Subjects passing over the said River (other than of the Inhabitants of Littleport, dwelling in the ancient Messuages or Cottages there) reasonable Rates for Toll, (viz.) one half-penny for a Man and Horse; and whereas within the said Vill there was an ancient Custom, Time out of Mind, that every Inhabitant of the said Vill in any ancient Messuage or Cottage there abiding habuer. & habere consuever. a toto tempore prædicto

3 Mod. 289.
 1 Salk. 12.
 2 Salk. 718.
 Case will not lie against the Defendant for not keeping a Ferry-boat where he had built a Bridge to pass over the River.

dicto libertatem transeundi the aforesaid River at the said Passage pro seipsis equis, &c. ad libitum suum sine aliqua solutione quacumq; Cumq; etiam the Plaintiff is an Inhabitant, &c. and ought to have Liberty of the said Passage, &c. and that the Defendant praemissorum non ignarus, but contriving to deprive the Plaintiff of the said Liberty (the Defendant being Proprietor, Occupier and Keeper of the said Passage) had not maintained any Ferry-boat at the said Passage, sed ill. facere recusavit licet (per the Plaintiff) requisit, &c. by Reason whereof the Plaintiff from such a Time to such a Time, had lost the Liberty of Passage contra consuetudinem praedict. & ad damnum, &c.

The Defendant pleaded, that he, at his own Costs, had built a Bridge over the said River at the Passage aforesaid, where all People might pass over with more Ease and Safety; and that after the Building the said Bridge, he had always kept it in good Repair, and for that Reason he had neglected to keep a Ferry-boat prout ei bene licuit.

The Plaintiff replied, that he was hindered of his Passage contra consuetud. praedict.

And upon a Demurrer to this Replication it was argued for the Defendant, that this is a good temporary Bar, (viz.) for all the Time that the Bridge is kept in Repair; but that when the Bridge decays, the Passage shall revive.

That this Custom is unreasonable and against Law, because 'tis such a Charge upon the Defendant, which cannot have any lawful Commencement; and 'tis such a Charge which can never be discharged, as 'tis pleaded by Way of local Custom; for if all the Inhabitants join in a Release, it will not bar their Successors; therefore 'tis such an extraordinary Charge, that it cannot possibly be discharged; for which Reason the Inhabitants ought to have prescribed in their Messuages in Fee; and for this the Cases in the * Margin were cited.

Besides, here the Plaintiff prescribed transire ad libitum, which is too general, because the Defendant by such a Prescription is obliged to carry him (the Plaintiff) over the River at Midnight, which being very unreasonable, therefore the Custom ought to be confined to reasonable hours.

To which it was answered, that the Expression ad libitum is the same with the usual Clause, Omni Anno & omni tempore Anni, in Case of a Common claimed by Prescription.

Custom,
whether
reasonable,
or not.

* Bro. Prescription 76.
F. N. B. 258.
1 Roll. Abr.
559.
1 Leon. 142.
5 H. 7. 9.
2 Ed. 4. 24.
27 H. 8. 27. a.
Roll. Rep.
289.

And it was argued for the Plaintiff, that this is an Easement, and every Easement is a Charge; as for Instance, a Way over another Man's Lands is a Charge upon the Lands; so a Custom to grind at a Lord's Mill Toll-free is an actual Charge, as in this Case, tho' in 18 Ed. 4. 3. it was held a good Custom.

For the Plaintiff.
Every Easement is a Charge on some Body.

That the Grounds of Customs (as Littleton observes) is not to be searched into too nicely, for some of them are good, tho' they could never have any reasonable Commencement, but Usage hath wrought it self into a Law.

18 Ed. 4. 19.
Regist. 153. b.
F.N.B. 124. A.
1 Cro. Baker
v. Berriman.

Holt Ch. Justice. This is a good Custom and well pleaded, and quoad the Custom, the Cases in the * Margin were cited; and that the Manner of Pleading ad libitum suum is good. See Rast. Ent. 617. b. 3 Cro. 441, 664. 1 Cro. 419.

* 1 Leon. 143.
1 Inst. 113.
12 H. 8. 5.
1 Cro. 413.
18 Ed. 4. 3.
1 Roll. Abr.
216. 3 Cro.
746. 1 Roll.
56.

And per Gregory Justice, The Inhabitants of a Mill, tho' they are only Tenants at Will, may, by Virtue of a local Custom, claim an Easement; and they all agreed, that a Passage over the Water was of the same Nature as a * Highway, and that a Ferry is for the common good.

† 15 Ed. 4. 29.
18 Ed. 4. 3.
Hob. 118.
Dyer 71.
* 13 Rep. 33.
2 Inst. 30.
1 Cro. 132.
22 H. 6. 44.

(2.) Adjudged that the Plea in Bar is ill, for the Defendant cannot alter the Passage with a License from the King, upon an Inquisition returned on a Writ ad quod damnum, for the Subjects have no Right to pass over the Bridge without the Leave of the Defendant; 'tis the like Case of a new Way assigned or laid out, which will not justify the Stoppage of the old Way.

1 Cro. 266.

(3.) Resolved, that the Plaintiff cannot have this Action, because the Ground of it is for a common Nuisance, for which an Action will not lie, unless there is some special Damage alleged, or where the Party grieved can have no other Remedy; but in this Case the Plaintiff had not declared upon any particular Damage, but generally, that he had lost the Liberty of the Passage, &c. and therefore this Action will not lie; and chiefly to avoid Multiplicity of Actions; for by the same Reason that it may be brought by the Plaintiff, it may be maintainable by every Person passing that Way; and for Authorities in this Point, the Cases in the † Margin were cited.

Action will not lie for a common Nuisance.

† 1 Inst. 56.
5 Rep. 72.
3 Cro. 664.
Moor 180.
13 H. 7. 26.

And per Holt Ch. Justice, This Custom upon which this Action is brought, consists only in Discharge of Payment of Toll, and not in any Right of Passage by the Inhabitants;

Custom, where it consists in Discharge.

tants; for it appears to be a very ancient Passage for all People, and the Inhabitants of Littleport had not the Passage quatenus Inhabitants, but as the King's Subjects, for 'tis a common Passage.

18 Ed. 4. 3. b.

1 Cro. 418.

1 Roll. Abr.

353.

Also this Custom did not consist in compelling the Defendant to keep a Ferry-boat, because he is obliged to do it without any Custom of the Mill; therefore it plainly appears that this Custom consists merely in Discharge; and it was never doubted, but that such Customs are good.

Besides, this Charge on the Defendant is not without some Recompence, for he hath Toll of all People, except the Inhabitants of Littleport; like the Case in 3 Cro. 569. where it was adjudged, that having the Tithes was a sufficient Recompence to charge the Parson with Keeping a common Bull or Boar.

And as concerning special Damages sufficient to maintain an Action on the Case, it was resolved, that if a Highway is so stopped, that a Man is delayed in his Journey a little While, and by Reason thereof he is damaged, or some important Affair neglected; this is not such a special Damage for which an Action on the Case will lie; but a particular Damage to maintain this Action ought to be direct, and not consequential; as for Instance; the Loss of his Horse, or by some corporal Hurt, in falling into a Trench in the Highway.

Besides, if the Defendant had extorted any Money of the Plaintiff, or of any other Inhabitant of Littleport, for Toll for his Passage over the River, in such Case an Action would have laid for Taking the Money contrary to the Custom, because there is no other Remedy, as it was adjudged in the Case of the Inhabitants of Southwark, cited in 1 Inst. fo. 56. a.

Judgment was given for the Defendant, that the Action would not lie.

D E

Term. Sanct. Mich.

Anno 3 Willi. & Mariæ in B. R.

Beake *versus* Kent. Trin. 3 W. & M. B. R.
Rot. 377.

ASSUMPSIT against the Defendant as Executrix to John Kent.

The Defendant pleaded in Bar three several Judgments obtained against her as Executrix upon three several Bonds, at the Suit of three Persons, and that she had Assets in her Hands only to the Value of 5 s. liable to those several Judgments.

The Plaintiff replied separately to each Judgment, (viz.) that one Half of the Money recovered on each Bond, was more than was justly due from the Testator; and that the Plaintiff in each Action was willing and had offered to accept the other Moiety of the Defendant in Discharge of the Whole, and upon Payment thereof to release the several Judgments, and that the Defendant had sufficient Assets *ultra* those Judgments were satisfied to pay the Plaintiff, and concludes severally after Pleading the Matters as aforesaid, (viz.) that the Defendant *judicia prædicta* deceptive & *ea intentione ad defraudandum & decipiendum* the Plaintiff, had kept the said Judgments on Foot.

The Defendant rejoined generally maintaining her Bar, that she had not Assets *ultra*, and traversed *quod ipsa prædicta*

4 Mod. 63.
Where an Executrix pleaded several Judgments, and that she had not Assets *ultra*, good.

dicta (the Defendant) deceptive & ea intentione ad defraudandum & decipiend' (the Plaintiff) de damnis suis prædict' de judiciis prædict' seu eorum alteri exonerari seu relaxari distulit & adhuc differt aut judicia prædict' seu eorum alterum in suis robore & vigore permanere adhuc permittit ad defraudand' & decipiend' (the Plaintiff) de damnis suis prædict' modo & forma prout, &c.

And upon a Demurree to this Rejoinder, it was shew'd for Cause, that the Defendant ought to have rejoined severally to every Judgment, and not to include all three Judgments in one general Traverse; because it must be a great Disadvantage to the Plaintiff to take Issue thereon, for if he should join Issue upon the Fraud in all the Judgments, and if one should be found not to be kept on Foot by Fraud, the Issue would be against him; and on the other Hand it would be no good Issue to plead generally, that judicia prædict' sine eorum alterum was continued by Fraud; and therefore it was inferred, that the Defendant ought to have made * several Traverses.

Sed per Curiam, the Rejoinder is good, because the Traverse was, That all or any of the Judgments were kept on Foot by Fraud; and if Issue had been joined, that all the Judgments were kept on Foot by Fraud, and it had been found, that one of them alone had been kept, &c. by Fraud, this Issue had been found for the Plaintiff, because the Plea was false in Part, and for that Reason the whole is false; therefore this general Form of Pleading could be no Disadvantage to the Plaintiff, (as is pretended) for he might have taken Issue, that all were continued by Fraud, or else he might have singled out one of the Judgments, and taken Issue upon that alone.

The Plaintiff seeing the Opinion of the Court, pray'd Leave to discontinue, which was granted.

Killigrew *versus* Sayer. Trin. 1 W. & M. C. B.
Rot. 365.

2 Vent. 79.
In an Action
of Covenant
on Articles,
the Breach
is not well
assigned.

THE Case, H. Sir William Killigrew the Plaintiff being Vice-Chamberlain to Katherine Queen Dowager, it was agreed between him and the Defendant Sayer by certain Articles under Hand and Seal, for the Sale of the said Office, by and with the Consent of the Queen, and that the Plaintiff, during his Life, by the Agreement of the
De.

Defendant and the Consent of the Queen should hold, have, enjoy and receive all the Profits of the said Office as fully as the Plaintiff then enjoyed the same, (viz.) the yearly Pension of 200 l. to be paid by the Queen during the Life of the Plaintiff, and his yearly new Year's Gift of 120 l. for his Life, and also the yearly Fee and Livery being 66 l. per ann. and also the Salary and Board Wages out of the Cofferer's Office, being 120 l. per ann. amounting in all to the Sum of 386 l. per ann. or thereabouts, all which I the said George Sayer do engage my self, that the said Sir William shall enjoy and receive during his Life; and that I will receive no Part thereof until after the Death of the said Sir William Killigrew.

Upon these Articles, an Action of Covenant was brought, in which the Plaintiff set forth the whole Agreement in his Declaration, and averred, that the Queen did consent to all Things therein contained, and that he in Performance thereof did surrender the said Office into the Hands of the Queen, and that the Defendant by his (the Plaintiff's) Procurement was admitted thereto, & officium illud una cum proficuis eidem officio spectan' & pertinen' abinde hucusq; tenuit & gavisus fuit & adhuc tenet, and 750 l. of the Salary and Board Wages belonging to the said Office for 6 Years, ending at Mich. 1688. ad festum illud secund' conventionem & Agreement' præd' Georgii Sayer præd' Will' Killigrew solubiles devenerunt & solvi debuerunt quas quidem 750 l. aut aliquam inde denarium idem Will'us non recepit & præd' Georgius licet sepius requisit', &c. eidem Will'o nondum solvit sed ill' ei solvere, &c.

The Defendant pleaded, that he hath always hitherto permitted the Plaintiff to receive yearly all the Profits of the said Office according to the said Agreement, absq; hoc quod præd' Georgius a tempore confectionis scripti agreementi præd' hucusq; aliqua proficua præd' officio Vicecamerarii prædict' pertinen' vel spectan' recepit vel gavisus fuit & hoc, &c.

Upon a Demurrer to this Plea, the Defendant had Judgment in C. B. that this was a good Bar to the Action; and now upon a Writ of Error brought in B. R. upon that Judgment, it was insisted for the Plaintiff, that the Plea was no Answer to the Breach laid in the Declaration, for that was, that * 750 l. was in Arrear, and that the Defendant had not paid it; but the Traverse was, that the Defendant had not received any Thing, which is no Answer to the Breach.

* 3 Brown.
Entr. 57.
3 Cro. 914.
Vaugh 191.
Sid. 178.

Econtra for
the Defen-
dant.

To which it was answered for the Defendant, that the Matter on which the Plaintiff insisted was frivolous, and no Breach of the Agreement, because the Defendant did not oblige himself to pay the fees, but only that he would not receive any of them, but permit the Plaintiff to enjoy them; and for ought appears to the contrary, the Plaintiff might have received them if he would, for he hath not alledged, that he demanded them of the Quern, or done any Thing towards the Receiving them; and therefore if there was nothing more in the Declaration which amounted to a Breach, it would have been ill in it self.

But the Counsel for the Plaintiff in the original Action insisted, that the Allegation in the Declaration, (viz.) that the Defendant had held and enjoyed the said Office, together with the Profits thereunto belonging, was Matter of Breach, and positively alledged; and therefore ought to be answered, and the Plea is a direct Traverse of this Matter, which is the Breach if any at all is alledged.

But per Holt Ch. Justice, and Justice Eyre, there is no Breach alledged in this Declaration; and therefore the Judgment quod placitum sufficiens, &c. ought to be reversed, and a new Judgment given quod narratio insufficiens in lege existit; and then the Plaintiff may begin a gain.

Two other Judges of a contrary Opinion, (viz.) for affirming the Judgment as it was: Nota; the Court of Common Pleas was of Opinion, that this Agreement did not bind the Defendant Sayer to pay the Money, because it was only, that he would not receive any of the Profits.

Sed Holt Ch. Justice, and Eyre doubted of that Matter, but they all agreed, that the Plaintiff must shew for Breach, that he could not receive the Money of the Queen.

The King versus Gately.

5 Mod. 138.
S. C.
Salk. 471.
S. C.
Sessions cannot make an Order to discharge an Apprentice.
* 5 Eliz. c. 4. par. 35.

UPON a Motion to quash an Order of Sessions made for the Discharging one Green an Apprentice from his Apprenticeship to one Gately, upon the Statute * 5 Eliz. there were two Exceptions made to the Order.

(1.) That it appeared to be an original Order made at the Sessions, whereas by the Statute the Parties in such Cases ought first to apply themselves to a Justice of Peace, and if he cannot compound the Matter, then he is to bind the

the Master to appear at the next Sessions; but by this Order it both not appear that any Application was made to the Justice, as directed by the Statute, &c.

(2.) This Order is not under the Seals of the Justices, ^{1 Saund. 315^d} which is expressly required by the Statute.

And per Curiam, both these are material Defects in the Order, and therefore it was quashed.

The King *versus* Rowe.

A Mandamus being granted to restore John Rowe to the Office of Sword-bearer of the City of Bristol; upon the Pluries the Mayor and Burgesses make this Return, setting forth the Cause of the Amotion, &c. And farther, that on such a Day, before the Mandamus, &c. the said John Rowe was, amongst others, indicted for High Treason, & quod taliter superinde processum fuit, that on such a Day, &c. the said Rowe was outlawed, which Outlawry remains still in full force, by Reason whereof he is persona inhabilis to have the said Office.

Mandamus, &c. Where the Court will not judicially take Notice of the Reversal of an Outlawry.

And now it was moved for a peremptory Mandamus, for that the first Part of the Return was not sufficient, &c. and as to the Outlawry, the Record of the Reversal thereof was now produced, which was upon a Writ of Error in B. R. since the Return of the Mandamus; and it was insisted, that by this Reversal the Disability was removed, and that the Court, upon View of their own Record, would ex officio take Notice of the Reversal of the Outlawry, because in this Case the Party had no Day in Court to plead it.

But the Court would not take Notice upon View of the Record, that this was the same Indictment and the same John Rowe who was returned outlawed, for this Reversal might be of another Outlawry upon another Indictment, and by another Person of the same Name; and it must appear judicially to the Court, that the Disability is removed, before the Court will grant a peremptory Mandamus; therefore they advised Rowe to take out a new Mandamus, and therein to recite the Outlawry, and the Reversal thereof; which was accordingly done.

Curia.

Blake & al' *versus* Gell. Mich. 1 or 2 Will. &
Mar. B. R. Rot. 146.

Nothing
shall be af-
signed for
Error which
might have
been plead-
ed to the
Action.

SCire facias upon a Judgment against T. S. issued a-
gainst his Certenants of his Lands, &c. and on a
Scire feci returned against several of them, they came in
and pleaded, that E. G. is another Certenant, &c. and
not summoned, and then a second Sci. fa. issued against the
said E. G. who was returned Tertenant, and that he was
an Infant under Age, &c. whereupon the Parole demurred
for Infancy; and afterwards the said E. G. attain'd to his
full Age, and then the Plaintiff in the original Action pro-
secutes a Resummons against all the Certenants aforesaid;
and the Sheriff returned them all summoned by Name;
and there was Judgment on the Scire facias, by Default,
against all of them.

And now upon a Writ of Error brought on that Judg-
ment, the Error assigned in Fact was, that E. S. (one of
the Certenants returned upon the Sci. fa. and also one
who was returned to be summoned upon the Writ of
Resummons) was dead, before the Day of the Return of
the said Writ.

And in this Writ of Error all the surviving Certe-
nants, and also R. S. Son and Heir of E. S. deceased, join-
ed; and in the Writ all this Matter was set forth, and
the Title of R. S. as Heir by Descent; and the Error was
assigned by all of them jointly.

And upon a Demurrer two Objections were made against
this Writ of Error.

(1.) That the Writ would not lie, because of the
Laches of the Plaintiff himself, for he might have pleaded
it upon the Return of the Writ of Resummons, and ha-
ving neglected that Opportunity, he shall never after assign
the same Matter for Error; for 'tis a Rule, that nothing
shall be assigned for Error which the Party might have
pleaded to the Action, and had a proper Time so to do; and
to prove this the Cases in the * Margin were cited.

(2.) That in this Case there were several Writs of
Sci. fa. ut supra, and therefore the Plaintiffs cannot all
join in one Writ of Error; and it hath been adjudged,
that where several Writs of Sci. fa. issue against several
Certenants in several Counties, upon one and the same
Judg-

* 3 Cro. 25.
2 Cro. 507.
547.
F. N. B. 104.
3 Cro. 739.

Judgment; those returned upon the one Writ cannot take Advantage of any Error in the Proceedings on the other Writs, for the Actions are several; and so it was adjudged in *† Angell and Cooper's Case*.

*† 1 Cro. 517.
Cro. Car.
372.*

But per Curiam, it was adjudged that the Writ was well brought, and the Error well assigned; and as to the first Objection it was answered, that the Plaintiff had no Time to plead the Matter; for by the Death of E. S. (one of the Tertenants) before the Return of the Writ of Resummons, all the Proceedings on the Sci. fa. were discontinued, and the Parties out of Court, and so had no Time to plead any Thing afterwards; and the Death of one Tertenant puts the Whole without Day; and for that Holt Ch. Justice cited the Cases in the Margin.

*Discontinu-
ance by the
Death of one
of the Ter-
tenants.*

*Keilw. 69.
Fitz. Abr.
Tit. Error,
pl. 7.*

And as to the second Objection, the Difference is, where the several Writs of Sci. fa. issue into several Counties, there the Law is ut supra; but in the principal Case, the last Sci. fa. is only supplemental to the first, and then both make but one Action.

And for these Reasons the Court gave Judgment for the Plaintiff in the Writ of Error, and said, that the Defendant Gell must bring a new Sci. fa. against the Tertenants, for the old Writ was put without Day causa qua supra.

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Term. Sanct. Hill.

3 Willi' & Mariæ, B. R.

Cudlip *versus* Rundle. Trin. 2 Will. & Mar.
B. R. Rot. 646.

4 Mod. 11.
S. C.
1 Cro. 187.
Exception
in a Deed,
where 'tis
good.

CASE, &c. wherein the Plaintiff declared, that he was possessed 5 die Martii, anno 36 Car. 2. of an House in Tavistock in the County of Devon, pro quodam termino annorum tunc & adhuc ventur. and being so possessed, demised the said House by Indenture to the Defendant for seven Years, by Virtue whereof the Defendant entered and was possessed; and being so possessed, and the Plaintiff likewise possessed of the Reversion, pro & durante termino prædicto primo mentionat. the Defendant on such a Day ignem suum in domo sua prædicta tam negligenter & improvide custodivit quod domus illa totaliter combust' & ruinat. fuit, &c.

The Defendant pleaded, that the Plaintiff Non demisit per indenturam prædicta modo & forma prout, &c. and thereupon they were at Issue; and by a special Verdict it was found, that the Plaintiff did demise by Indenture to the Defendant, a Messuage or Tenement called Ugbeare in Tavistock, together with all Out-houses, Edifices and Buildings, except one House called the New-house, for the Use only of the Plaintiff's Father, the Plaintiff himself, and for their Wives and Families to live in if they please, but not to be let to any other Person whatsoever, and at all
Times

Times when they should not live there, to be used by the Defendant, to have and to hold the Premises before demised, (except as before accepted) to the Defendant for seven Years, &c. and at the Time when the Fire happened all this New House was in the Possession of the Defendant, (except one Room which was in the Possession of the Plaintiff,) and that the Fire broke out in that Part which was in the Possession of the Defendant, which burnt down all the New House, and no more, and concluded *Si videtur Curia*, that the Plaintiff dimisit modo & forma, then he demitted & si non, &c.

The Points which were made upon this special Verdict were,

(1.) Whether this Action will lie by the Lessee for Years against his Under-tenant.

(2.) If the Verdict hath found sufficient to maintain the Issue.

As to the first Point, it was argued for the Plaintiff, that the Action would lie, because he is answerable over in Waste brought by his own Lessee; and the Difference is where the Plaintiff hath the Inheritance, and where he is only a Reversioner for Life or Years; so in the first Case this Action will not lie; but it will in the last Case *causa qua supra*, and according to this Difference there are many Cases cited as in the * Margin, unto all which the Court agreed; and therefore the Counsel for the Defendant did not controvert this Point.

But then the principal and only Doubt was upon the Words of this Exception in the Indenture, (*viz.*) Whether by the special Exception *ut supra*, the New House was wholly excepted, or whether it did pass by the Demise.

Now as to that Matter, it was argued, that this Exception was no more than a Privilege reserved to the Plaintiff to use the New House for such a particular Purpose as is expressed in the Demise; and that the Intention of the Party appears by the Negative Words, (*viz.*) not to be let to any other.

If it should be taken to be only a Tenancy at Will in the Defendant, yet that would be sufficient to maintain the Declaration, because the Substance is found, (*viz.*) the Demise by the Plaintiff to the Defendant, and the Continuance between the Terms shall not hurt.

It was argued for the Defendant, that the New House was totally excepted out of the Demise for 7 Years; for these Words (for the Use, &c.) are only Words of Description and Form, and do not qualify the precedent Part of the Exception.

For the Plaintiff.

* 3 Cro. 461.
1 Cro. 187.
5 Rep. 13.
Hern Pleader 161.
W. Jones 224.
3 Lev. 359.

† 2 Cro. 321, 328.
3 Cro. 40.
1 Inst. 281. b.
2 Roll. Abr.

707.
Hob. 72.
Owen 91.
1 Lev. 68.

* 2 Roll.
Abr. 709.
Dyer 260.
Curia.

Besides if it should be taken to be a Tenancy at Will in the Defendant, yet the * Variance between the Declaration and Verdict is fatal.

Sed per Curiam, By those Words in the Exception, the New House was accepted for 7 Years, and that the Defendant was Tenant at Will of the New House, and that the Issue was found against the Plaintiff; for he had declared upon an absolute Lease for 7 Years, and the Verdict hath found it a Lease at Will, and so 'tis not a Demise modo & forma as the Plaintiff had declared, for that this is a Variance in Substance, and not in Form only; and they all agreed, that if the Plaintiff had declared against the Defendant as Tenant at Will, the Action would lie, and the Plaintiff must have recovered; but here the Variance is fatal, and therefore Judgment was given, quod quer' nil capiat per Billam.

Henderson *versus* Foster.

Debt on
Bond for 30
and 6l. the
Condition
was for Pay-
ment of 18l.
good.

DEBT upon Bond pro triginta & sex libris. The Defendant demanded Oyer of the Bond only, and it was entered accordingly, and it was in sex triginta libris, and then the Defendant pleaded this Variance in Abatement.

The Plaintiff made an Entry of a Prayer on the Roll, that the Condition of the Bond might likewise be entered, and thereupon the Condition was entered in hac verba, which was for the Payment of 18l. and then demurred to the Plea, and the Defendant joined in Demurrer.

And it was adjudged, that this was no Variance, for that sex triginta and triginta & sex had one and the same Signification; therefore Judgment against the Defendant to answer over.

Knight *versus* Symms.

1 Salk. 254
S. C.
4 Mod. 97.
S. C.
Ejectment
for 5 Closes
of Land, A-
rable and
Pasture, not
good without
distinguish-
ing how ma-
ny of the
one and the
other.
Moor 702.
Owen 18.
Stile 202.
11 Rep. 55.

IN Ejectment the Plaintiff declared for five Closes of Land Arable and Pasture, called Long Furlongs, containing ten Acres.

Upon Not guilty pleaded, the Plaintiff had a Verdict; and it was moved in Arrest of Judgment, that the Declaration was ill, because the Quantity and Quality of the Lands were not distinguished and ascertained; for the Plaintiff ought to have set forth how many Acres of arable Land, and how many of Pasture distinctly, so as the Sheriff might certainly know what to deliver upon the habere facias possessionem. And

11 Rep. 55. Cro. Car. 414. 2 Cro. Wicks *ver.* Sparrow in Point. 2 Cro. 654. 1 Cro. 555.

And for this Reason the Declaration was held ill, and the Judgment set aside.

Nota; Per Holt Ch. Justice, a Writ of Error will lie on a Judgment in Ejectment quod recuperet, &c. before a Writ of Inquiry executed, for that is only as to the Damages.

Glover *versus* Cope. Pasch. 3 W. & M. B. R.
Rot. 267.

IN an Action of Covenant, and the Breach assigned for Want of Repairs, the Case was thus:

1. Copyholder in Fee made a Lease for Years, and afterwards surrendered the Reversion to A. B. who surrendered likewise to the Plaintiff; and the Defendant who was the Lessee assigned his Term to T. S. before any Action brought; and after the Assignment of this Term, the Plaintiff who was the second Surrenderee of the Reversion brought this Action of Covenant against the Defendant, the original Lessee, upon his express Covenant to repair, &c.

And upon a Demurrer to the Declaration the only Question was, Whether the Surrenderee of Copyhold Lands is a Person within the Purview of the Statute 32 H. 8. so as to enable him to maintain this Action against the Lessee, by Reason of the Privy of Contract transferred to him by Force of that Statute, as a Grantee of a Reversion might at Common Law; or whether Copyhold Lands are within the Meaning of that Act, it being formerly held they were not.

And after two solemn Arguments at the Bar, it was adjudged, per Holt Chief Justice and the Court, for the Plaintiff, (viz.) That the Grantee of the Reversion of Copyhold Lands was within the Intention and the Equity of that Statute, which is a remedial Law, and of great and universal Use, and absolutely necessary as well for Copyholders as others; and that by this Construction of the Statute, no Prejudice can arise to the Lords of Copyhold Manors; and the only Reason why Copyhold Lands have been adjudged not to be within the Purview of other Statutes which contain general Words, is because of the Respect to the Lord's Prejudice.

Quod nota; for this is the first Case which ever was adjudged upon this Point.

4 Mod. 80.
S. C.
3 Lev. 326.
S. C.
1 Salk. 185.
S. C.
The Surrender of the Reversion of Copyhold Lands may maintain an Action against the Lessee, upon an express Covenant to repair.
32 Hen. 8.
cap. 34.

3 Cro. 24.
Platt *versus* Plomer.
Hob. 176.

Walwyn *versus* Smith. Trin. 3 W. & M. B. R.
Rot. 631.

4 Mod. 86.
S. C.
1 Salk. 177.
S. C.
Discontinu-
ance of Pro-
cess is cured
by a Ver-
dict.

Curia.

WRIT of Error on a Judgment in an inferior Court of Record, and the Error assigned was a long Discontinuance of the Plea which appeared on the Record itself; for after the Plea entered, and the Appearance of the Defendant, &c. there was no dies datus nor any Court returned to be held in a Quarter of a Year together; but the Entry was, that upon such a Day (so long after) the Parties came into Court, & superinde, &c.

Sed per Curiam, This being after a Verdict, the Discontinuance is cured by the Statute of Jeofails, which Statutes do extend to inferior Courts of Record.

The like Judgment was given in this Term, in a Writ of Error between Boson and Phylor, where a Discontinuance was assigned for Error after a Verdict and Judgment in the Court of the City of Exon; and the Judgment was affirmed in both Cases.

Boson *versus* Phylor.

Exceptions
on a Writ of
Error
brought on
a Judgment
in an infe-
rior Court.

* Co. Ent.
315.
Rast. Ent.
168.
Dyer 262. b.

WRIT of Error on a Judgment in Trover obtained in the Court at Exon, and the general Error assigned; the Counsel for the Plaintiff in Error assigned these Errors ore tenus.

(1.) That the Process throughout is directed to the Serjeants at Mace generally, not naming them by their * proper Names, as they ought; sed non allocatur.

(2.) That the Process of Attachment against the Defendant was returned thus, (viz) nihil habet ubi summon' potest, and thereupon a Capias was awarded against him, which is irregular; for the Return of an Attachment is nil habet ubi attachiari potest nec est inventus in eadem; therefore since this Return was insufficient, the Court ought to have awarded an Alias Attachment, and not a Capias; for 'tis the Return of the Attachment, and not the Award thereof which must warrant the Capias; for that shall not issue, but where it appears by the Return of the preceding Process, that the first Process was ineffectual, which doth not appear by this Return; and therefore the Capias is used in this Case as the first Process, which is ill, because 'tis a Misnaming of Process, and that is Error even after a Verdict; sed non allocatur.

3

(3.) They

1 Roll. Abr.
680.
Vol. 158.

(3.) They had not returned any Custom to warrant the Use of a Capias in Process, for that is given by the * Statute, which doth not extend to Inferior Courts; and all the † Precedents in the like Cases shew an Usage Time out of Mind. * 19 H. 7. cap. 9.
† Rast. Entr. 169.

Sed non allocatur; for the Court held that both these Errors were cured by the Appearance of the Defendant, for thereby all mean Process was out of Doors, &c.

(4.) That the Entry of all the Continuances by Li. lo. was generally ad quem quidem prox. Cur. venit, &c. without saying coram * quibus tent. as it ought to be; sed non allocatur; for that the dies datus was special to a Day certain, naming before whom the next Court was to be held, and so need not be repeated upon the Appearance. * Rast. Entr. 168.
Co. Ent. 314.

(5.) For that the Judgment was Ideo concessum est per eodem Ballivos in eadem Curia, when it ought to be Ideo concessum est per Curiam; sed non allocatur; for both Ways are good, it being said before, that it was done in Court.

(6.) That there was a Discontinuance; sed per Curiam, that is helped by the Statute of Jeofails, it being after Verdict.

The Judgment was affirmed.

Tallant versus Germyn.

THE Defendant pleaded Misnomer in Abatement in this form:

Et prædict. J. Germyn (with an n at the End) venit & defend. &c. & dicit, that his Name is Germy (without an n) and not Germyn, prout, &c. and upon a Demurrer to this Plea it was adjudged against him; for that he had admitted his Name to be Germyn, by his appearing and making Defence by that Name.

But if he would have taken Advantage of the Misnomer, he should have pleaded in this Manner:

Et prædict. Johannes Germy qui per nomen J. Germyn superius implacitatur venit & dicit quod, &c. and for this Default, Judgment that the Defendant should answer over. Misnomer, not well pleaded in Abatement.
Rast. 49. b.

Stokeld

Stokeld versus Collingson.

Action
brought by a
Commissioner
to take
the Deposi-
tions of Wit-
nesses for his
Labour.

Action on the Case on several Promises, the first was Special, (viz.) Whereas the Plaintiff, at the Instance of the Defendant, served as a Commissioner for the Defendant, in a certain Suit depending between him and T. S. in the Exchequer; the Defendant, in consideration inde, promised to pay the Plaintiff as much as he should deserve for his Labour and Pains therein; the other were general Promises in the common Form, &c.

After a Verdict for the Plaintiff and entire Damages given, it was objected, that such Damages ought not to have been given, because the Special Promise was void, for that a Commissioner extraordinary ad examinandum testes, either in the Court of Chancery or Exchequer, was an Officer of the Court, in whom a Trust and Confidence was reposed by the Commission, and ought not to be at the Nomination of the Parties, and therefore the Plaintiff in the Execution of the Commission, did no more than what was his Duty, for which he ought not to be rewarded by the Party, because it looks like Bilbery.

But adjudged per totam Curiam, that this Action well lies upon this Matter; for tho' a Commissioner is an Officer of the Court, yet they cannot compel him to attend against his Will, and therefore the Parties are to take Care to name such Persons who will serve therein; and 'tis reasonable that it should be at the Charge of him for whom he officiates.

The Plaintiff had Judgment.

Page versus Wats.

Administra-
tor sued up-
on a Pro-
mise of the
Intestate,
pleaded two
Bonds, and
concluded
with *Plene
administravit.*

A Sumpsit against the Defendant, as Administrator, upon a Promise made by the Intestate.

The Defendant pleaded two several Bonds in Bar, and concluded his Plea with a general *Plene administravit*, without confessing any Assets to be in his Hands.

The Plaintiff replied specially, that the Defendant had Assets sufficient, besides what would satisfy the said two Bonds.

I

And

And upon a Demurrer to this Replication, per Curiam, the general Conclusion of the Plea in Bar hath waived the special Matter of the Bonds, therefore the Plaintiff should likewise have replied generally, and not specially, ut supra.

But no Counsel appearing for the Defendant, and the Issue offered being for his Advantage, and he refusing it, The Plaintiff had Judgment.

Tucker *versus* Hodges. Trin. 3 Will. & Mar.
B. R. Rot. 465.

IN Replevin, &c. the Defendant made Conusance as Bailiff to A. B. and C. for Rent arrear of a Fee-farm, and sets out a Title from the Crown by a Grant from the Lord Hawley, and the rest of the Trustees for King Car. 2. named in the Statute for disposing Fee-farm Rents, according to the Provision thereof.

Where all the Assignments of a Lease for Years ought to be set forth in the Pleadings.

The Plaintiff replies, that before King Car. 2. had any Thing in the Rent, &c. King Jac. 1. was seised in Fee of the Place where, and by his Letters Patents (the Exemption whereof, as far as it concerned this Matter only, was shewn forth, and good) granted it to Sir Fra. Bacon and others, for ninety-nine Years absq; aliquo inde reddendo, whose Estate, Title and Interest therein per diversas medias assignationes devenit cuidam Thomæ Northmore, who being possessed, &c. demised the same to him at Will, &c.

And upon a general Demurrer to this Replication, it was adjudged, that the Bar was ill, because the Defendant had not set forth all the mean Assignments as he ought in his Plea at large, for he claims under them, and must be p[ro]by thereunto; and the Difference is, that where the Party pleading derives an Estate to his Adversary, under which he doth not claim any Thing, there such general Pleading is sufficient, because he hath no Means to know another Man's Title; but 'tis otherwise where he himself claims under it; quod nota.

Judgment for the Abowant.

E c

Carvell

Carvell Executor of Dodsworth versus Edwards.
Trin. 3 Will. & Mar. B. R. Rot. 349.

Where a
Letter of
License is a
Defeasance,
and plead-
able in Bar.

DEBT upon Bond, and likewise upon a Judgment due to the Testator Dodsworth.

The Defendant pleaded in Bar Letters of License under the Hand and Seal of the Testator, which were made between the Defendant and his Creditors, to which the Testator was a Party, reciting, that whereas the Defendant had a Right in such a House; and it was thereby agreed, that he should give Power to the Testator to sell the same, and to divide the Money in Proportion amongst the Creditors as far as it would reach; and that upon Receipt of such their Proportions, every of the said Creditors should give the Defendant a Release of all Matters, &c. before the Agreement: And it was farther agreed, that in the mean While, and until the said House should be sold, and from thenceforth after the said William Edwards shall not be sued or prosecuted at Law, or his Person or Goods molested by any of the said Creditors named in the said Articles, for any Thing past, sub poena reliction. & exonerationis debiti vel debitorum talium personarum, as shall so sue or prosecute, &c.

The Plaintiff made a frivolous Replication, and upon a Demurrer to it, two Objections were made to the Plea; first, that this Matter in the Letter of License consisted only in Covenant, upon which an Action might be maintained, but it cannot be pleaded in Bar to the present Action.

(2.) That this is a personal Lien of the Testator only, for his Executors are not named; and it being a Penalty, 'tis the same in Nature with a Condition; and personal Conditions will never extend to Executors, unless expressly named; and to prove that Matter the Cases in the Margin were cited.

It was argued for the Defendant, that this is a Release and no Covenant, and the Words of the Deed are general not to sue at any Time, which amounts to a Release; and this Difference is taken in the Books, (viz.) where the Restraint is only for a certain Time, and where 'tis not to sue at all; in the first Case 'tis a Covenant, but in the latter 'tis a Release; and to prove this, the Cases in the Margin were cited.

* 9 Rep. 52.
Noy 5.
Dyer 65.
3 Cro. 398.
27 H. 8. 16.
Bro. Stat.
Merch. 43.
1 Roll. Rep.
68.

† 1 Inst. 236,
274. b.
21 H. 7. 23,
24.
2 Roll. Abr.
403.
2 Bulst. 95,
290.
Bridgm. 117.
1 And. 307.
3 Cro. 352.

But per Holt Ch. Justice, this is a Defeasance, and no Release, and he cited Moor 811. and the whole Court were of that Opinion, and that it being a good Defeasance is pleadable in Bar.

See Antea between Ayloffe and Sckrimshaw, the same Point.

Leech *versus* Thompson. Pasch. 3 W. & M.
B. R. Rot. 221.

W RIT of Error on a Judgment in a Special Verdict in C. B. where the Case upon the Pleadings was as followeth:

¶ One Simon Leech was seised of the Lands in Question for Life, Remainder to his first, second and third Son, &c. in Tail, Remainder to Sir Simon Leech, (the Plaintiff in Error) in Fee.

Simon Leech (the Tenant for Life) before he had any Issue born, sealed and executed a Deed purporting a Surrender of all his Estate, &c. unto Sir Simon the Remainder Man, which Deed he (the Tenant for Life) delivered to T. S. as his Deed, for the Use of Sir Simon Leech; but it was found, that afterwards the said Tenant for Life continued in Possession as formerly for 5 Years, and that the said Sir Simon Leech did not know of the said Deed of Surrender until such a Day, which was 5 Years after it was executed; and that then he agreed and consented to the same and not before; and it was farther found, that within the said 5 Years, and before Sir Simon Leech had actually consented to the said Surrender, the said Simon Leech (the Tenant for Life) had a Son born, who was now the Lessor of the Plaintiff in Ejectment.

The Question was, whether this Surrender was compleat in Law before Sir Simon Leech, who was to take thereby, had actually assented thereto; for if so, then the contingent Remainders were destroyed, because the particular Estate upon which they depended was determined and gone before the Remainder could commence.

But if the Delivery of the Deed was only a Beginning of the Surrender, and an actual Assent of Sir Simon Leech was necessary to compleat it, then the particular Estate was not destroyed until such Assent made, before which Time the Contingency happened, and the Remainder actually vested in the Son the Lessor of the Plaintiff, and then Sir Simon's As-

Surrender by Tenant for Life to him in Remainder, not good without the actual Assent of the Surrendree.

sent came too late ; for by the vesting of the Remainder in the Son, all Possibility of a Surrender by the Tenant for Life, to the mediate Remainder Man in Fee was taken away.

And after several Arguments in C. B. it was adjudged for the Plaintiff, (viz.) that the Surrender was not compleat by the Delivery of the Deed ; but that an actual Assent of the Surrendree was absolutely necessary to compleat it, and till such Assent nothing passeth out of the Surrendtor, and then by Consequence the Birth of the Son between the Delivery and the Assent of the Surrendree, did destroy the Possibility of the Surrender, and no Relation of Time can make it good.

But Justice Ventris was of a contrary Opinion, (viz.) That the Law will intend an Assent in the Surrendree, because the Surrender was for his Benefit ; and that immediately upon the Delivery of the Deed, the Estate passed out of the Tenant for Life, and vested in Sir Simon Leech, and that in such Cases the Estate doth not remain in the Surrendtor, until the Assent of the Surrendree, but passeth immediately, and vesteth in him until an actual Disassent.

But the Judgment was affirmed by the whole Court of B. R. for the Reasons supra.

The King, &c. versus Inhabitants of Hornsey.

Presentment upon View of a Justice of Peace, that a Way is out of Repair.

ONE Buck a Justice of Peace of Middlesex, presented the Inhabitants of Hornsey, in the County of Middlesex, at the Quarter-Sessions, upon his own View, for not repairing the Highways leading to Hornsey, which Presentment being removed by Certiorari into B. R. the Defendants pleaded Not guilty, and the Cause was tried before Holt Chief Justice, at the Sittings in Middlesex, and the Jury found a special Verdict, (viz.) That the Way was out of Repair, but that it was not a Highway, but a private Way.

2 Lev. 112.

Et per Holt Chief Justice, the Verdict is against the Defendants, because they pleaded Not guilty, upon which Issue it cannot be given in Evidence, that 'tis no Highway, but that Matter ought to have been pleaded specially.

And he held, that where a Justice of Peace presents an Highway upon his View, to be out of Repair, there

there the Parties are estopped to plead, that it is in Repair.

But the other Judges were against him in both Points; for they held this Matter might be given in Evidence upon the general Issue, and that the Parties might traverse the Non-Repairing, tho' the Presentment was upon View; for that cannot be a greater Estoppel, than the finding of a Grand Jury who are upon Oath.

But the whole Court agreed, and said it was so adjudged by Hale Chief Justice, that if the Defendants plead specially to such a Presentment, (viz.) that they ought not to repair it, they must likewise shew who ought to repair, or else the Plea will be ill. ^{1 Sid. 140.}

Hawkins versus Cook.

IN a Prohibition the Case was, Cook libelled in the Spiritual Court against Hawkins, for Defamatory Words spoken in London, (viz.) Thou hadst a Bastard after thy Husband's Death, and Sentence was given there against Hawkins, from which he appealed, and now moved for a Prohibition, suggesting that the Words are actionable by the Custom of London. ^{Libel for scandalous Words spoken in London.}

The Court doubted whether a Prohibition should be granted after Sentence; and yet per Curiam, Cook notwithstanding the Sentence may bring an Action in London for the same Words, to which the Sentence cannot be pleaded in Bar; and by this Means the Party may be doubly punished for one and the same Thing; Curia advisare vult. ^{2 Roll. Abr. 319.}

Jones versus Bew.

L. C. J. Shaw. R. P. D.

UPON a Trial at Bar on an Issue directed out of Chancery, the Case was;
 N. That the Predecessor of the present Bishop of Landaffe, did by Deed grant the Office of Chancellor or Commissary of that Diocese unto one Loyd, and to Dr. Jones (the Plaintiff) to hold the same Conjunctim & divisim to them, and to the Survivor of them. ^{Office of a Commissary granted to two conjunctim & divisim, good.}

It was agreed by the Counsel on both Sides, and made a Part of the Case, that this Office had been anciently and usually

usually granted to two conjunctim & divisim, and to the Survivor of them, which appeared by several old Grants now produced at this Trial; and now Loyd being dead, Dr. Jones claimed this Office by Virtue of this Grant by Survivorship.

But Dr. Bew the present Bishop of Landaff refused Jones, and granted this Office to his Son Mr. Bew, who was sued by Jones, &c.

And the only Question was, whether this (being a judicial Office) could be granted to two Conjunctim & divisim.

After several Arguments, it was adjudged, that this was a good Grant, and the principal Reason of the Judgment was, because of the long and constant Usage, and the Offices of most of the Bishopricks in England, are and have been constantly so granted, (viz.) to two Conjunctim & divisim, &c.

The King *versus* Warrington.

4 Mod. 65.
S. C.

1 Salk. 144.
S. C.

Where there are two Sheriffs, and one a Party, the *Venire facias* may be directed to the other.

Information against one of the Sheriffs of the City and County of Chester, where by their Charter they have two Sheriffs; upon Not guilty pleaded a Suggestion was made on the Roll, (viz.) that the Defendant is one of the Sheriffs of the City; and therefore prayed a *Venire facias* to be directed to his Companion the other Sheriff only, which was done, and he returned the Jury, and a Verdict was had against the Defendant.

And now it was moved in Arrest of Judgment upon the Misawarding the *Venire facias*, for that in this Case, it ought to have been directed to the Coroners, and not to the other Sheriff, because those two make but one Officer, and for this Purpose the Cases in the * Margin were cited.

* Brownl.
Brevia Judicial' 396.

2 Brownl. Ent. 44. 14 H. 4. 34. 1c H. 4. 9. Bro. Return. 42. 1 Roll. Abr. 492. 8 H. 6. 12.
1 Cro. 138. Stile 342. 36 H. 6. 1. 8 H. 6. 26. Plowd. 382.

But on the other Side it was said, that in the Cases of Bethell, Sheriff of London, against Harvey, and of Rich, Sheriff of London, against Player, the *Venires* were directed to the other Sheriff alone, (viz.) in the first Case, to Sheriff Cornish alone, and in the other Case to Sheriff North alone, and the same Exception taken in both Cases, but over ruled.

And at another Day Pasch. 4 Will. it was adjudged by the whole Court, that the *Venire facias* was well awarded. Judgment against the Defendants. Gum-

Gumble *versus* Falkingham.

IN a Prohibition the Case was, (viz.) Falkingham, Rector of H. libelled in the Consistory Court of the Bishop of E. for Tithes of two Mills, the one a Water-mill and the other a Wind-mill, and this Demand was of predial Tithes, (viz.) The tenth Toll-dish.

Modus as to the Tithes of a Water-mill.

Gumble pleaded a Modus of 2 s. 6 d. as to the Water-mill; and as to the Wind-mill, if any Tithes ought to be paid, it ought to be personal Tithes, (viz.) The Tenth of the Profits, and not the tenth Toll-dish.

Falkingham the Rector, by Way of additional Libel, as they call it, replies, that as to the Water-mill, Gumble had added a Pair of new Stones to that Mill, and by that Means the Modus was destroyed; and as to the Wind-mill, he replied, that by the Canon Law, and by the Law of this Land, it ought to pay predial, and not personal Tithes; and thereupon that Court proceeded against Gumble.

And now it was moved for a Prohibition, suggesting a Modus as to the Water-mill, ut supra, and as to the Wind-mill, he set forth the Statute of Ed. 6. concerning Tithes, (viz.) That Tithes ought not to be demanded if not antiently paid, &c. and farther, that if any Tithes were due for a Mill, they are only personal Tithes out of the clear Profits of the Mill, and not the tenth Toll-dish, as was demanded.

In the arguing this Case, two Questions were made :

(1.) Whether the Modus for the Water-mill was destroyed by the Addition of another Pair of Stones under the same Roof.

(2.) The other Question upon which the great Doubt did arise was, what Kind of Tithes ought to be paid out of a tithable Mill; if only personal Tithes, (viz.) The Tenth of the clear Gain, or else predial Tithes, (viz.) The Tenth of all the Income in general.

And the Cases in the * Margin were cited for the Prohibition, and for the Continuance of the Modus.

* 2 Roll. Abg. 652.

12 Rep. 36.

F.N.B. 51.

1 Roll. Abr. 641, 652, 656. 4 Rep. Lutterell's Case. Contra Sir Tho. Pope's Case. 1 Roll. Rep. 84. 1 Roll. Rep. 405. 2 Inst. 490, 621, 652. 2 Cro. 429. 1 Brownl. 31.

Et

Et per Curiam, the Modus is not destroyed by the Addition of the new Pair of Stones; but as to the other Matter they doubted, and therefore a Prohibition was granted generally, on Purpose that the Point may come before them upon a Declaration and Demurrer to it, so that the Matter might receive a solemn Determination by the Court.

Mallacke qui tam, &c. *versus* Speering.

Debt upon the Statute for selling Wine without License.

* *Quod cum* in an Action of Assault and Battery is ill, and Judgment reversed.
1 Lev. 206.

Where the Declaration is not positive, but by Way of Recital *Quod cum*, &c.

Inducement to the Action.

† Co. Ent. 161.
2 Cro. 362,
437.
2 Saund. 319.

DEBT upon the Statute 12 Car. cap. 25. for selling Wine without a License; the Plaintiff began his Declaration by Way of Recital.

ff. Pro eo videlicet * quod cum the Defendant at several Times, between such a Day and such a Day, had sold Wine by Retail by the Pint, to Persons unknown, (viz.) six Pints of Port and six Pints of Claret, &c. all which Wine was sold to be drank and consumed in the Defendant's House, he (the Defendant) for all that Time being not authorised or enabled in the Manner and Form as the Statute in that Case made doth prescribe and appoint, contra formam Statuti, per quod actio accrevit, &c.

Upon the general Issue pleaded, there was a Verdict for the Plaintiff; and now it was moved in Arrest of Judgment, that the Declaration is not positive, but by Way of Recital only, and so doth not directly charge the Defendant with the Crime intended.

Sed per Curiam, The Plaintiff had Judgment, for all the Precedents in the like Cases are after this Manner, as in Debt upon the Statute of Tithes, &c.

Moreover, This is an Action of Debt wherein the Defence is only an Inducement to the Action; for 'tis the Non-payment of the Penalty which is the original Cause.

So in a Declaration on a Bond it was quod cum the Defendant bound himself; and for this the Precedents in the † Margin were cited.

Jefferies *versus* Legendra.

3 Lev. 320.
S. C.
4 Mod. 38.
S. C.
2 Salk. 443.
S. C.

CASE, &c. upon a Policy of Assurance, wherein all the Words were in the usual Form, excepting only in the Conclusion these Words were added:

3

ff. The

ff. The Ship warranted to depart with Convoy.

Upon the general Issue pleaded, the Jury found a Special Verdict, (viz.) That the Ship did depart from the Port of London (which was the Place from which she set out) in Company of the Convoy intended, and sailed together with the Convoy as far as the Isle of Wight, in Pursuance of her Voyage towards Cadiz; and there they were separated by Stress of Weather, that the Convoy put into Torbay, and the insured Ship into the Port of Fowey in Cornwall; that three Days afterwards the Wind setting Right to bring the Convoy down the River, the Master of the insured Ship sailed out of Fowey on Purpose to meet the Convoy, but it did not come; and then the insured Ship was seized with another Storm, so that she could not return from whence she came, but was driven upon the French Coast, and there taken by the Enemy, &c.

Special Verdict in an Action on the Case on a Policy of Assurance.

After several Arguments of this Special Verdict, the Plaintiff had Judgment per totam Curiam, and their principal Reason was, because there was no Manner of Neglect, or other Default found in the Master of the Ship; but it appeared he had done all his Power to keep Company with the Convoy; and 'tis expressly found, that he departed with Convoy from his first Port, which answers the Words of the Policy; but it would have been otherwise if any Fraud or Neglect had been found in the Master of the insured Ship after his Departure, notwithstanding he departed out of the first Port with Convoy; for the Meaning of the Words (warranted to depart with Convoy) are, that the insured Ship should keep Company with the Convoy, the whole Voyage, if possible.

Sir James Smith's Case.

Mandamus to restore him to the Place of Alderman of the City of London; upon the Return thereof Serjeant Pemberton thus argued for him:

Mandamus to restore him to the Place of Alderman of the City of London.

ff. That a Corporation is an artificial Body composed of divers constituent Members ad instar Corporis humani, and that the Ligaments of this Body politick or artificial Body, are the Franchises and Liberties thereof, which bind and unite all its Members together, and the whole Frame and Essence of the Corporation consist therein; and when a Quo warranto is brought against a Corpora-

The Definition of a Corporation.

tion, the Writ calls it a Franchise, which it is very properly.

2 Ed. 4. 5, 6.

That every Grant of a Franchise hath a Condition tacitly annexed to it by Law, the Breach of which Condition will absolutely determine the Grant.

* 2 Ed. 3.

28.

15 Ed. 4. 7.

2 Inst. 282.

That there are several Judgments in Quo warranto, and this appears in the Books cited in the * Margin on several Occasions.

Yelv. 190. Co. Ent. 527.

That a Judgment in a Quo warranto quod capiantur amounts to the same Thing as a Judgment quod capiuntur in the Indicative Mood, like the Judgment in Debt quod recuperet, which is the same with quod recuperat, which appears by the Form of the Entries, and by the Cases cited in the † Margin.

† Rast. Ent.

54.

Co. Ent. 538, 559. 9 Rep. 98. 15 Ed. 4. 7. Ryley 277. Maynard's Ed. 2. 16, 24.

And that by the Judgment against the Corporation, (viz.) That it be seized into the King's Hands, the Body politick is dissolved.

This is only Part of the Argument of the Serjeant; cætera desiderantur.

D E

Term. Paschæ.

4 Will. & Mariæ B. R.

Bruges versus Searle, & al'.

IN Trespass for impounding his Sheep, the Defendant justified Damage-tenant in his freehold. Prescription
for Common
of Pasture
for Sheep,
good.
The Plaintiff replies, and prescribes for Common of Pasture in the Place where, &c. for all his Sheep Levant and Couchant on his Tenement in Edisborough as appurtenant to his said Tenement.

And Issue being taken upon the Prescription, there was a special Verdict to this Effect, (viz.) That the Plaintiff had Common of Pasture there, for all his Sheep prout (the Plaintiff) interius placitando allegavit sed iidem Juratores ulterius dicunt, that the Plaintiff hath Common there as well for all other Cattle Levant and Couchant on his Tenement, as for Sheep, as appurtenant to his said Tenement, &c.

The Question was, Whether the Plaintiff had not failed in his Prescription for Common of Sheep only, when he had Common for all other Cattle likewise, for a Prescription is an entire Thing, and cannot be divided, as the Plaintiff hath done in this Case.

But per Curiam, this is a general Verdict for the Plaintiff, because the Jury have found, that the Plaintiff had Common, &c. prout allegavit, and all the Matter found afterwards is Surplusage and void. 2 Lev. 253.
3 Cro. 722.

1 Brownl.
177.
Thorogood
vers. Johnson.

Nevertheless as to the Doubt intended, the Court being willing to settle it, delivered their Opinion, (viz.) that upon the whole Matter, the Verdict was found for the Plaintiff, for that the Action was only for impounding Sheep; and therefore the Plaintiff might well abide his Prescription as to them only, since nothing else was in Dispute; and the finding that he had Common for other Cattle, both not falsify his Prescription, but stands well with it.

The Plaintiff had Judgment.

The King versus James and Thomas.

The Copies of Affidavits taken before a Commissioner are good Evidence to prove a Perjury, without the Commissioner being present at the Assizes.

Information against the Defendants for Perjury, for that they swore by Affidavits filed on Record in the Common Pleas, and taken before the Commissioners in the County, that they were never arrested at the Suit of T. S. who had brought an Action against them in that Court, and had Judgment by Default, and a Writ of Inquiry executed, all which they set aside upon the said Affidavits.

At the Assizes before Justice Eyre in the Oxford Circuit, the Copies of these Affidavits were proved to be examined by the Originals on the File, and were produced in Evidence by the Prosecutor.

Against which it was objected, that it was no Evidence, unless the Commissioner who gave the Oath was present to prove that the Defendants were the same Persons who made Affidavit before him; and thereupon this Question was adjourned for the Opinion of the Court.

Et per totam Curiam, the Copies supra are Evidence sufficient without the Commissioner who administered the Oath, for otherwise such a Perjury might be unpunishable.

Ferrers versus Miller. Hill. 3 W. & M. B. R.
Rot. 693.

1 Salk. 217.
In Ejectment and ancient Demesne, pleaded, the Defendant need not say defendit vim & injuriam.

IN Ejectment, &c. the Defendant pleaded that the Lands in the Declaration, &c. are ancient Demesne, in this Form.

¶ Et præd' (the Defendant) per T. S. attorn' suum venit & dicit quod tent' prædiæ cum pertin' tenentur de T. C. ut de manerio suo de A. in Com' præd' quod quidem manerium

um est & a tempore cujus contrarium memoria hominum non existit fuit de antiquo dominico coronæ Dom' Reg' quodq; tent' præd' cum pertinentiis a toto tempore supradicto placit' & placabilia fuerunt per parvum breve Dom' Regis de Recto in curia manerii præd' & non alibi, &c. & hoc, &c.

¹ Brownl.
57.

The Plaintiff demurred specially, for that the Defendant had not made himself a Party to the Suit, which he ought to do by adding the Clause (defend' vim & injuriam suam) and relied on Littleton, Sect. 199. 1 Inst. 127. and Brownl. Tit. defence.

Note; the Word quando must always be left out.

But per three Judges, the Plea is well without defendit vim & injuriam, for it is to the Jurisdiction of the Court, and most of the Precedents are so, without making any Defence, and so is the Record of * Alden's Case.

* 5 Rep.

Sed per Holt Ch. Justice, the Plaintiff is not obliged to take the Plea without the Defence, as in the Case where on Outlawry is pleaded in Non-ability, the Plaintiff may refuse the Plea, unless Process is annexed; but having accepted it, he cannot afterwards demur for that Cause.

Judgment for the Defendant.

The King versus Inhabitants of Colliton.

UPON a Certiorari to remove an Order, it appeared to be thus:

Exceptions
to an Order
of Sessions
for settling a
poor Man.

ff. Two Justices of Peace, &c. reciting, that upon hearing the Parishioners of Honiton, Axminster and Colliton concerning the last Settlement of one Hurley (then residing in Honiton) it appeared to them, that the said Hurley was last legally settled at Axminster; therefore they order him to be removed thither, from which Order Axminster appealed to the Quarter-Sessions, where the Order was repealed, and the Sessions farther ordered, that the said Hurley should be removed to Colliton as being legally settled there; but their Order did not recite, that Colliton was heard upon the Appeal.

And now it was moved to quash the last Part of this Order of Sessions, first because it was an original Order as to Colliton, and so they are deprived of an Appeal which is given by the Statute; and the Sessions ought only to have vacated the first Order, and not to have any Order on Colliton; for by this Means Colliton is charged without any Remedy, notwithstanding they could make it appear, that Hurley

That it was
an original
Order.

Hurley had a later Settlement in any other Parish whatsoever, for that this Order of Sessions is positive upon them.

Sed non allocatur; because it appears, that Colliton was a Party to the first Order made by the two Justices, and so by Consequence to the Appeal; wherefore the Sessions might well settle him upon them, because by the Appeal Colliton was before the Sessions; secus if Colliton had not been a Party to the original Order, but mere Strangers; for then the Sessions could not charge them as not being before the Court.

That it did not appear, that the Man was likely to be chargeable.

(2.) The next Exception was, that it did not appear by either of the Orders, that Hurley was likely to be chargeable to the Parish.

Sed non allocatur; for this is an Order of Sessions grounded on a Complaint concerning a Settlement by another Order, and thereby it shall be intended, that Hurley was likely to be chargeable, because of the Controversy between the Parishes; but 'tis otherwise in an original Order, for there it must appear, that the Party was likely to be chargeable; but here the original Order was vacated, therefore it cannot concern Colliton.

That the Caption of the Order was not returned.

(3.) The next Exception was, That there was no Caption of this Order returned, for that here was only the Stile of the Sessions on the Top, but it was not said, that ordinatum fuit prout sequitur, &c. but the Order was distinct without Relation to the Stile.

That it was said, *ad Quarterialem Sessionem.*

Sed non allocatur, but held to be well enough.

(4.) The fourth Exception was, that the Stile was *ad generalem Sessionem*, &c. but did not say *Quarterialem*, and the Statute is express, directing the Appeal before the Justices at their Quarter-Sessions; and this being a new Law, and a new Jurisdiction, ought to be literally pursued.

And Holt Chief Justice was of that Opinion, and two Justices contra; therefore it was adjourned to search for precedents, and upon Search, they were found to be both Ways, and almost equally in Number.

The King *versus* Inhabitants of Hartfield.

Upon an Order of two Justices to remove a poor Man, he may appeal to the Sessions as well as the Parish.

TWO Justices of Peace made an Order to remove Nicholas Wells from the Parish of Hartfield to the Parish of Framfield, from which Order Wells the Party himself,

self, and not the Parish, appealed; and thereupon the Sessions made an Order to return him to the Parish of Hartfield, from whence he was removed; but they did not by any express Words vacate the first Order.

It was now objected, that the Party himself cannot appeal, because the Appeal is given only to the Parish aggrieved, and not to the Party removed.

Sed non allocatur; for per totam Curiam, the Party may appeal as well as the Parish.

(2.) The next Exception was, that this is an original Order of Sessions; and besides, it doth not vacate the first Order, for the Sessions is only to vacate or affirm the first Order, and not to make a new Order:

And Holt Ch. Justice was of that Opinion, but two Judges against him, for that the Sessions Order doth vacate the Order of the two Justices by Implication, because it orders the contrary, and that is sufficient in this Case; and upon their Opinion the Order was confirmed.

The Sessions Order doth vacate the Order of two Justices by Implication.

The King *versus* Berry.

Indictment upon the Statute 5 Eliz. for exercising a Trade in a Borough, not being bound Apprentice to it; and upon a Certiorari to remove it into B. R. the Mayor made this Return, (viz.) Humillime certifico quod ad Sessionem pacis, &c. per juratores presentatum existit quod billa sequens est vera, (viz.) Quod prædict. Berry did exercise, &c. omitting the Clause Juratores pro Domino Rege presentant quod, &c.

Return of a Certiorari to remove an Indictment for exercising a Trade, not being bound Apprentice, not good.

The first Exception was, that Billa sequens est vera is naught; sed non allocatur as to that Part of the Return.

(2.) Exception was, that here is no Bill at all; for 'tis not said that it was presented by the Jury.

Sed per Curiam, this is no Return to the Certiorari, for the Writ commands to return an Indictment; but this is none, therefore they could not quash it, neither would they suffer this Return to be filed, because it was insufficient, wherefore the Mayor was ordered to amend the Return: Et per Curiam, a Return quod humillime certifico, is not good.

Jones

Jones *versus* Hill. Trin. 1 Will. in C. B. in
Winford's Office.

3 Lev. 206.
Case by a
Vicar for Di-
lapidations,
good.

Action on the Case by the Successor of a Vicar brought against his Predecessor for Dilapidations, who by Taking a second Benefice with Cure, &c. had lost this Vicarage; upon Not guilty pleaded, the Plaintiff had a Verdict; and it was now moved in Arrest of Judgment, that this Action would not lie, but that the proper Remedy was in the Spiritual Court.

Godolp. 173.
249.

3 Bull. 91,
92, 153.

2 Bull. 227. 11 Rep. 49, 72. Trin. 12 H. 7. Rot. 69. Pas. 13 H. 8. Rot. 126. Hill. 15 H. 8. Rot. 306. Hill. 15 Jac. Rot. 474.

But after a long Debate the Plaintiff had Judgment; these Cases in the Margin were cited.

Furden *versus* Moor. Hill. 3 Will. & Mar.
B. R. Rot. 364.

2 Vent. 214.
The Report
of this Case
in C. B.

In Ejectment
upon two De-
mises and
one Habend-
um, good,
reddendo sin-
gula singulis.

WRIT of Error on a Judgment in Ejectment in C. B. the Case was thus:

It. In Ejectment the Plaintiff declared upon two Demises of several Lands by several Parties, but laid only one Habendum, (viz.) Habendum tenementa prædicta, so demised by the aforesaid several Parties for seven Years; and lays in his Declaration, that the Defendant entered into all the aforesaid Tenements, & ipsum (the Plaintiff) a firma sua prædicta (in the singular Number) ejecit expulit & amovit.

The Error assigned was, that the Declaration was ill for Want of another Habendum, for that the Verdict is general; and 'tis incertain to which Demise this single habendum relates.

But per Curiam 'tis well enough, reddendo singula singulis.

Laver *versus* Hobbs.

Where the
Plaintiff
shall have
full Costs,
where not,
the Damages
being under
40 s.

TRespass, &c. Herbam depascendo & solum & fundum carucis subvertend. & in solo fodendo & cum terra inde project. aquæ cursum suum obstupand. per quod clau- sum suum inundat. fuit, &c.

Upon Not guilty pleaded, the Plaintiff had a Verdict and 2d. Damages; and the Secondary refusing to tax any Costs more than the Damages, it was now moved, that the Plaintiff might have full Costs, as in other Cases.

Et per Curiam, Upon View of the * Statute, the Plaintiff shall not have full Costs in this Case, for that it was within the very Words of the restraining Clause, which allows no more Costs than Damages, if the Damages are under 40 s. quod nota. * 22, 23 Car. 2. cap. 9. per 149. Cro. Car. 163, 307.

But in the Case of Colethurst and Hayes. Hill. 3 Will. B. R. Rot. 374. which was Trespass for Chasing his Sheep, and that he (the Defendant) ad loca ignota eos abduxit & elongavit; after a Verdict for the Plaintiff and 2d. Damages, he had his full Costs upon a Motion, principally upon the Word Abduxit, which is the same in Signification with Asportavit.

And see Raym. 487. Trespass for throwing down Stalls in a Market, full Costs per Curiam, tho' the Damages were under 40 s.

Jones versus Bow.

UPON a Trial at Bar in Ejectment, the sole Question was, if Sir Robert Carr was actually married to Isabella Jones, by whom he had Issue, and under whom the Plaintiff claims.

The Defendant, by Way of Anticipation to the Evidence, which the Plaintiff was about to give, moved the Court, that the Plaintiff ought not to be allowed to prove a Marriage between them, because there was a Sentence in the Arches, upon a Suit brought against her causa jactationis maritagii; by which it was decreed, that there was no Marriage between them, but that they were free one of another, and that they might marry separately, which they afterwards did.

And this Sentence was now offered in Evidence by the Defendant's Counsel, as a Bar to conclude the Plaintiff from any Proof of the Marriage, unless he could shew that the same was repealed.

And upon Debate the Court were all of Opinion, that this Sentence, whilst unrepealed, was conclusive against all Matters precedent, and that the Temporal Courts must

G g

The Plaintiff was not allowed to prove a Marriage, there being a Sentence in the Spiritual Court, that the Parties were not married, and the Temporal Courts will give Credit to such Sentence whilst it stands in Force.

give

give Credit to it until 'tis reversed, it being a Matter of mere Spiritual Conscience.

And hereupon the Plaintiff was nonsuit.

Chevely *versus* Bond. Hill. 1 Will. & Mar.
B. R. Rot. 307.

4 Mod. 105.
Statute of
Limitations
pleaded to
an Action on
a Bill of
Exchange
brought a-
gainst the
Drawer.

Action on the Case on a Bill of Exchange brought a-
gainst the Drawer; the Defendant pleaded, that the
Cause of Action did not accrue at any Time within six
Years ante exhibitionem Billæ.

The Plaintiff replied, that he and the Defendant are
and were Merchants, and that this Bill of Exchange was
upon Account between them, concerning Merchandise;
and farther, that the Defendant was beyond Sea, (viz.)
In Barbadoes, for all the Time after the Cause of Action
accrued, until such a Day when he returned, and that he
commenced his Action within two Years after he returned
to England.

There was a frivolous Resolinder and Surrejoinder,
and thereupon a Demurrer; and in this Case it was ad-
judged as followeth:

* 1 Jac. c. 16.
Antea Re-
new & Axton,
the like
Judgment.

Mod. Rep. 70.
71, 269, 270.
1 Sid. 465.

See Cro. Car.
334.
See Hall &
Wibank an-
tea.

First, That Bills of Exchange for Value received are
not such Matters of Account as are intended by the Ex-
ception in the * Statute of Limitations.

(2.) That by the Exception in the Statute concerning
Merchants Accounts, no other Actions are excepted but Ac-
tions of Accounts.

(3.) That the Defendant's being beyond Sea was no
Excuse, because the Plaintiff might have filed an Original
against him, or taken out a Latitat. See the Statute 4 &
5 Annæ.

The King *versus* Roberts.

In an Infor-
mation, the
Offences
must not be
accumula-
ted, but a
single Of-
fence ought
to be laid
and made
certain.

In an Information against Roberts the Ferry-man, over
the River Mency, which parts Anglesea from Carnar-
vonshire in Wales; it was laid generally, (viz.) That this
was an ancient Ferry Time out of Mind, and that 1 d.
was the usual Rate for the Passage of a Man and Horse,
7 d. for 20 Cattle, 2 d. for 20 Sheep, &c. and that Ro-
berts being the common Ferry-man between 7 Septembris,
Anno

Anno 2. and the Day of exhibiting this Information, injuste oppressivæ & deceptivæ cepit & extorsit de diversis ligeis & subditis Domini Regis ignotis to the Attorney General, passing that Way, diversas denariorum summas exceden' antiquam Ratam & pretium pro passagio & transportatione suis & averiorum suorum, videl't, pro passagio & transportatione cujuscumque personæ cum equo suo 2 d. & pro quibuscumque 20 Catallis 2 s. & sic secund' ratam prædict' pro majori vel minori numero averiorum, &c.

1 Roll. Abr. 88.
1 Cro. 314.
2 Cro. 365, 609.
1 Lev. 38.
were cited for the Prosecu-
tor.

Upon Not guilty pleaded the Defendant was found guilty, and now it was moved in Arrest of Judgment, that the Information was too general and incertain, because it did not alledge, that any particular Person, or any certain Number of Cattle were ferried over within the Time laid in the Information, neither did it mention any particular Person from whom the extorted Rates were taken, which it ought to do, that the single Offence might certainly appear before the Court.

1 Cro. 380.
2 Leon. 38, 39.

And after great Deliberation, the whole Court was of that Opinion; and per Holt Chief Justice, in every such Information, a single Offence ought to be laid and ascertained, because every Extortion from every particular Person is a separate and distinct Offence; and therefore they ought not to be accumulated under a general Charge, as 'tis done in this Case, because each Offence requires a separate and distinct Punishment according to the Quantity of the Offence; and 'tis not possible for the Court to proportion the Fine or other Punishment to it, unless 'tis singly and certainly laid.

1 Cro. 438.
1 Sid. 91.

'Tis true all Informations of the Exchequer are general as this is, but the Reason is, because they are for certain Penalties.

Judgment was arrested.

Vaughan *versus* Lewis.

THIS was a special Action on the Case, brought against the Defendant for a false Return of a Mandamus, for admitting and swearing the Plaintiff Bailiff of New Radnor in Wales; in which the Plaintiff declared, that the Borough of New Radnor was an ancient Borough Time out of Mind, and that he (the Plaintiff) on the first Day of October, Anno 3 W. & M. was, according to

Objection to the Return of a Mandamus to admit and swear the Plaintiff Bailiff of a Corporation.

the Custom there used, chosen Bailiff of the said Borough; then he sets forth the Mandamus directed to the Bailiff, Aldermen and Burgesses of the said Borough, and avers, that the Defendant was at that Time an Alderman, and that it belonged to him to swear the Plaintiff; but that he (the Defendant) in nomine of the Bailiff, Aldermen and Burgesses of the said Borough, caused a false Return to be made thereto, (viz.) That the Plaintiff was never elected Bailiff, ubi revera, &c. per quod, &c.

This Cause was tried before Holt Chief Justice, at the Sittings in Middlesex, and at the Trial, the following Objections were made by the Counsel for the Defendant.

(1.) It appeared by the Charter produced, That this was no Borough Time out of Mind, as 'tis laid in the Declaration; for the Charter was granted by Queen Elizabeth, and they were incorporated thereby by the Name of Bailiff, Aldermen and Burgesses, which was a new Name then given; so that the Plaintiff cannot be chosen according to Custom Time out of Mind, as he hath alledged.

Sed non allocatur; for the Charter recites, That this was an ancient Borough, and for ought appears the Charter is but a Confirmation, and not a Destruction of their ancient Customs.

(2.) The next Objection was, That it appeared upon the Evidence, that the Plaintiff was chosen 29 7ber Anno 3. and not upon the first Day of October, as 'tis alledged in the Declaration; and 'tis laid, that he was elected secundum consuetudinem on the first Day of October, which is not so, because the Custom to choose, &c. is upon the 29 Day of 7ber, and so the Plaintiff hath failed in the Custom, for the Day is Parcel thereof.

Sed non allocatur; because the Day is not material, for that the Plaintiff hath proved himself to be chosen upon the customary Day, (viz.) 29 7ber; so the Day in the Declaration is but form, and being laid before the Action brought 'tis well enough; but it had been otherwise, if the Plaintiff had laid the right Day in his Declaration, and had proved himself chosen upon a wrong Day, for there he would have failed of the Custom; but here he hath proved himself duly chosen before the Action brought; so that there is a Difference where the Election is wrong, but the Day laid Right, and where the Election is Right, and the Day laid Wrong.

(3.) The next Objection was, (viz.) It was alledged, that the Defendant caused the false Return to be made in nomine of the Bailiff, Aldermen, &c. but the Defendant proved, that it was by Consent of six other of the Corporation; therefore the Action ought to be joint, and not several.

Sed non allocatur; because he could not prove that this Consent was in a legal Common Council, or that others of the Corporation were summoned thereto.

Then the Plaintiff was put to prove that the Defendant caused the Return to be made, which he did in this Manner, (viz.) He proved that the Defendant was personally served with an Alias mandamus; and that he told the Person who served him with that Writ, that he would take Care a Return should be made; and farther two Rules of Court were produced, (viz.) one for an Attachment against the Defendant for not making a Return, and the other to discharge that Rule for an Attachment upon Payment of Costs, and appearing to the Action, &c.

And this was admitted to be good Proof as to that Matter, and the Plaintiff had a Verdict.

But there was the following Clause in this Charter, (viz.) That any Officer in futuro to be chosen, &c. non diutius remanebit in officio, &c. quam infra burgum prædictum vel libertat' & franchises inde cum tota familia inhabitabit, &c. and it appearing, that the Plaintiff, when he was chosen one of the Common Council, (out of which the Bailiff must be chosen) was a Foreigner, it was pretended, that his Office of Common Council-Man was void by this Clause, and so not qualified to be elected Bailiff.

This Matter was reserved and referred to the Opinion of Holt Chief Justice, who declared his Opinion was for the Plaintiff, and that this Clause was declaratory of the Common Law; and that the not inhabiting infra the Borough, &c. was a good Cause to remove a Member; but that it did not ipso facto determine his Office without an actual Amoval; and moreover, that the Defendant ought to have returned this special Matter, and not as he had done, (viz.) nunquam fuit electus.

Not dwelling within a Borough, is a good Cause to remove a Man, but it doth not determine his Office.

Jentreer *versus* Jenkins.

IN an Action of Trespass, &c. the Defendant after full Defence made, (viz.) Venit & defendit vim & injuriam quando, &c. pleaded that the Plaintiff was an Alien, &c.

And

Where the Defendant venit & defendit vim & injuriam, and must omit quando, &c.

And upon a Demurrer to this Plea, it was held ill, because the Defendant after he had made a full Defence by the *Quando*, &c. cannot plead in Disability, that the Plaintiff is an Alien born, &c. but that in such Case he ought to go no farther in his Defence than *venit & defendit vim & injur'*, omitting *Quando*, because by that *Word* the Defendant hath admitted, that the Plaintiff hath a Capacity to sue; and to prove this Matter, the Cases in the * *Margin* were cited.

* Litt. Sect.
195.
1 Inst. 127. b.
Bro. Defence
217.
Rast. Ent.
352. b.

Bridges versus Horner.

In Trespass
with a Continuando, where
'tis well laid.

Trespass, &c. upon Not guilty pleaded, there was a Verdict for the Plaintiff; and it was moved in Arrest of Judgment, that the Declaration was ill; for it was for erecting and continuing 300 Perches of Stone Wall on the Soil of the Plaintiff, 2 April' Anno 2 W. & M. transgression' præd' quoad continuation' muri præd' a 20 die Februarii Anno primo W. & M. usq; diem exhibitionis Billæ continuando, so that the Continuance is laid for one Year before the Commencement of the Trespass, and entire Damages being given, all is void.

Sed non allocatur; for this Continuando being for a Time before the Commencement of the Trespass, is senseless and void, and it cannot be intended, that any Damages were given for that Matter, which in its self is void; therefore the Plaintiff had Judgment.

The Corporation of Plymouth versus Collings.

In Debt for a
certain Penalty, the
Plaintiff
shall have
Costs.

9 H. 6. 66. b.
14 H. 6. 13.
Cro. Car. 559.
10 Rep. 115.
2 Cro. 70.
Co. Ent. 163,
164.
3 Lev. 374.

DEBT for a Penalty of twenty Pounds, brought by the Corporation qui tam, &c. upon a private Act of Parliament concerning the New River Water brought to Plymouth; the Action was brought against Collings for diverting the Water-course contrary to the Statute.

Upon nil debet pleaded, the Plaintiffs had a Verdict at the Assizes; and the Question now was, Whether they should have Costs upon a Recovery on this new and penal Statute; and after Deliberation it was held per totam Curiam, the Plaintiffs shall have Costs, because here was a certain Penalty given to certain Persons, and so within the Rule

Rule

Rule for Costs; but 'tis otherwise where the Penalty is incertain, or where 'tis given to a common Informer; and so it was adjudged upon a Retoverp on a private Act of Parliament between the * Corporation of Cutlers and Ruslin, that the Plaintiffs should have Costs, because the Penalty was given to a certain Person; but 'tis otherwise where given to an Informer.

* Mich. ;
Will. B. R.

Pett versus Inhabitants of Wingfeild.

UPON a Certiorari to remove an Order of Sessions, the Case appeared to be thus, (viz.) A. B. was bound Apprentice to T. S. according to the Statute, who died within the Term, and having made his Last Will, did thereby constitute Pett to be his Executor, who refused to receive this Apprentice, and thereupon the Sessions made an Order upon Pett, to take and receive the Apprentice, and to maintain him for the Residue of the Term.

Whether the Justices have Power to place an Apprentice with the Executor of his Master.

The Question was, Whether the Justices of Peace have any such Power as to compel an Executor to provide for the Apprentice of his Testator, when it doth not appear that he had Assets, and in Case of an Order (as this is) the Executor hath no Remedy; but if it had been in the Case of Covenant, there the Executor might have pleaded Plene administravit, and so helped himself.

1 Sid. 216.

And the Court inclined against the Power of the Justices; sed adjournatur.

The King versus Rogers.

CONVICTION before a Justice of Peace upon the Statute against Deer-stealing, removed into B. R. by Certiorari, and confirmed by the Court; and now it was moved for Execution against Rogers upon this Conviction, and he had it by a Fieri facias; and if the Sheriff should return nulla Bona, then a Capias against the Body; quod nota; and see the Statute 13 Car. 2. cap. 10.

Upon a Conviction for Deer-stealing, the Execution shall be by Fieri facias.

Bush

Bush versus Coles.

Where an
Exception
in a Lease
shall amount
to a Reser-
vation.

Covenant against the Assignee of the Lessee upon an Indenture, by which the Plaintiff demised a certain Messuage to the Lessee for so many Years (excepting such a Room), with free Liberty of Passage, Ingress, Egress and Regress, thro' such other Rooms of the demised Premises, unto the Room excepted, &c.

The Lessee assigned the Premises, &c. and the Assignee stopp'd the Passage, &c. and this was assigned for Breach of the Covenant.

And after Argument it was resolved per totam Curiam, that this Exception amounted to a Reservation, it being a Thing newly created, and not in esse before, (viz.) a Way of Passage.

Now upon a Reservation an Action of Covenant will lie, as where Rent is reserved Covenant will lie upon the Words of Reservation, without any express Words of Covenant.

The Plaintiff had Judgment.

Cro. Eliz.
657.
Moor 553.

Chapman versus Derby. Hill. 3 Will. & Mar.
B. R. Rot. 156.

Assumpsit,
and the Pro-
mise well
laid.

2 Saund. 207.
See postea
Curry versus
Stephenson.
S. P.

ERROR of a Judgment in C. B. in an Assumpsit, wherein the Plaintiff declared as Administrator to T. S. and sets forth, that the Defendant Indebitatus fuit eidem (the Plaintiff) in so much Money, by him (the Defendant) received to the Plaintiff's Use, as Administrator of T. S. and objected, that the Promise was ill laid.

Sed non allocatur; so the Judgment was affirmed.

Culliford versus Blandford.

* 23 H. 6.
cap. 15.
Action upon
the Statute
for a false
Return of a
Member of
Parliament.

THIS was an Action upon the Statute * 23 H. 6. brought against the Mayor of Dorchester, for a false Return of Sir Robert Raper to be a Burgess for that Place, whereas Mr. Trenchard was duly elected to serve in Parliament.

The Action was brought in B. R. by Bill, by a common Informer qui tam, &c. for the Penalty of 40 l. after the Time given by the Statute to the Party chosen, and not returned, was elapsed.

And at the Trial at the Nisi prius, a Case was made and stated for the Opinion of the Court of B. R. by which it appeared, that this Return was made 3 March, Anno 3 Willi. and that the Bill was not filed within a Year after the Return; but that the Latitat, which was the Process on which the Defendant appeared, was sued out within the Year after the Offence committed; and hereupon two Questions were made.

(1.) If this Informer, to whom all the Penalty is given by the said Statute 22 H. 6. is such an Informer as is intended by the Statute * 31 Eliz. which restrains Informers to exhibit their Actions within a certain Time, (viz.) where the Penalty is given to the King, then it must be brought within two Years; and if to the King and Party, then it must be brought within one Year after the Offence committed. * 31 Eliz. cap. 5

(2.) If he should be taken to be an Informer within the Statute 31 Eliz. then whether the suing out a Latitat within the Year is a sufficient Commencement of the Action within the Meaning and Proviso of that Statute.

And as to the first Question, Justice G. Eyre was clear of Opinion, that this was Casus omissus out of the Statute 31 Eliz. because here the Penalty was given neither to the King alone, nor to the King and Party, but to the Party himself alone, and therefore he held that this Action might be maintained after the Year; but Justice Dolben doubted, &c.

Sed per Holt Ch. Justice, There is a Difference where the Penalty is given to the Party alone, and none to the King; for in such Case 'tis clearly out of the Statute 31 Eliz. but here by the Statute 22 H. 6. there is a Penalty of 40 l. given to the King, as well as 40 l. to the Party grieved; 'tis true, they are separate, but that makes no great Difference from a joint Penalty to the King and to the Party; for upon this Statute of 22 H. 6. the Party might have brought his Action qui tam, &c. for 80 l. and the King should have a Moiety; but the other Judges doubted of that Matter.

As to the 2d Question, three Judges held clearly, that the suing out a Latitat within the Year, was a sufficient Commencement of the Suit to save the Limitation of

Noy 71.
11 Rep. 65. b.
Cro. Eliz.
138.
1 Sid. 53, 60.

Time, because the Latitat is the Original of B. R. and may be continued on Record as an original Writ, &c. and it hath been adjudged, that the suing out a Latitat within the Time, is sufficient to prevent the Incurring of the Statute of Limitations.

Sed per Holt Ch. Justice, This Action is for a Penalty given by a Statute, for which the Plaintiff might have brought an Action of Debt by Original in this Court, because the Statute gives the Action; and there is a Difference between a Civil Action and an Action given by a Statute; for in the first Case the suing out a Latitat within the Time, and continuing it afterwards will be sufficient; but in the other Case, if the Party proceeds by Bill, he ought to file his Bill within Time, that it may appear so to be upon the Record it self.

But the Plaintiff had Judgment, and afterwards a Writ of Error was brought.

Parker *versus* Harris. Mich. 3 Will. & Mar.
B. R. Rot. 27.

4 Mod. 76.
2 Vent. 249,
270, 272.
1 Salk. 262.
Reservation
of Rent *se-*
cundum ra-
tam of 18 l.
per Annum, is
a void Re-
servation.

ERROR of a Judgment in C. B. where the Case was as followeth:

ff. Harris brought an Action of Debt against Parker, and declared upon two Demises of one Messuage, two Gardens, &c. and laid the first Demise 1 May, 35 Car. 2. of the Premises situate, lying and being in & super acclivitatem de Hampsted (Anglice, the Rise of Hampsted-hill) Habendum for seven Years, from 25 March before, rendering 18 l. per Annum Rent, payable quarterly, and laid the second Demise de al. messuagio scituat. ut supra, upon the same 25 March, Anno 35 Car. 2. Habendum ad voluntatem & quamdiu ambabus partibus placuerit reddendo the Rent of Sum of lawful Money of England, ad ratam, Anglice, after the Rate of 18 l. per Annum, during the Continuance of the said Demise last mentioned, and for 99 l. Rent arrear upon the several Demises, &c. this Action was now brought.

The Defendant pleaded, that tempore dimission. predict. superius fieri supposit. the Plaintiff nil habuit in tenementis predictis cum pertinent. unde supponitur dimission. ill. fieri & hoc, &c.

The Plaintiff replied, quod diu ante tempora predict. separal. dimissionum, &c. scilicet 13 die Novemb. Anno 26
2 Car. 2. }

Car. 2. the Lord Wotton demised to Harris, one Piece of Parcel of Land, together with an ancient Messuage and Barn thereon, being in Hampsted prædict in Com' prædict, unde the Premises in the Declaration are Parcel, Habendum for 41 Years, (the Lord Wotton adtunc & ibidem habent plenam potestatem jus & titulum to make the said Demise for 41 Years,) per quod the Plaintiff entered, and was possessed, and being so possessed 1 die Maii ann. 35 Car. 2. dimisit ten'ta prædicta in narratione mentionat' modo & forma prout superius narravit * & hoc parat' est verificare unde petit iudicium.

* Nota he ought to have concluded to the County.

Upon a general Demurrer to this Replication, the Plaintiff had Judgment in the C. B. and now the Errors assigned were as follow:

1. That the Reservation of the Rent upon the second Demise, (viz.) secundum ratam 18 l. per ann. was a void Reservation, because it would be a Means to multiply Actions without Number, for that the Lessee might bring an Action of Debt for Rent for every Year, there being no certain Time or Day appointed for Payment.

(2.) That the Venue laid, (viz.) super acclivitatem de Hampsted Hill is naught, because acclivitas is not a Place from whence any Venue can arise.

Acclivitas is not a Place from which a Venue may arise.

And afterwards in Michaelmas-Term following, the Judgment was reversed for the Errors aforesaid, but more especially for the first Error; for the Court held such a general Reservation of Rent to be void for the Reasons supra.

A Judgment is an entire Thing, and cannot be reversed or affirmed in Part.

But then it was insisted for the Plaintiff, That the Judgment might be reversed quoad the second Demise only, and that it might be affirmed quoad the first Demise which was well laid.

11 Rep God-fry's Case. Moor 283.

Sed per Curiam, the Judgment is an entire Thing, and therefore it could not be reversed in Part, and affirmed in Part; but if 'tis erroneous as to any Part, the entire Judgment must be reversed; and so it was in this Case.

Rogers versus Cook.

THE Plaintiff brought an Action on the Case as Administrator, and declared on 4 several Promises, of which 3 were laid to be made to the Intestate, and the 4th was a general insimul computasset between the Plaintiff and the Defendant, of Matters in the Plaintiff's own Right.

1 Salk. 10. What Things cannot be joined in one and the same Action.

The Defendant after an Imparance pleaded a frivolous Plea in Abatement, and thereupon the Plaintiff demurred. And upon opening the Cause, the Court ex officio abated the Bill, for that it appeared on the Record it self, that the several Demands in the Declaration were incompatible, and would not be joined in one and the same Action, for it requires several Judgments, and of distinct Natures.

Howard *versus* Pitt. Trin. 4 Willi.

1 Salk. 261.
Where a
Writ of Er-
ror in the
Exchequer-
Chamber
was abated
by the Death
of the Plain-
tiffs in the
Writ, a Re-
mittitur must
be entered,
otherwise
the Plaintiff
must sue
forth a *Sci. fa.*

T Respass against five Defendants, and likewise against Pitt, and the Plaintiff recovered 1500 l. Damages; the Defendants within the Year brought a Writ of Error in the Exchequer Chamber, which depended there almost three Years, and within that Time three of the Plaintiffs in Error died, so that the Writ of Error was abated; and thereupon the Plaintiff Howard immediately took out a special Capias (reciting the Matter aforesaid) against Pitt and the other two who survived; and thereupon Pitt was taken in Execution.

And now the Court was moved for a Superedeas to the special Capias, for that the Process was irregular.

(1.) Because the Ca. fa. contains in it self sufficient Matter to found a Superedeas, for it recites the Judgment to be obtained three Years past against the Defendant Pitt and five others, and that a Writ of Error was brought on that Judgment, and that three of the five Plaintiffs in Error were dead, by which the Writ of Error abated; and that Pitt and the other two survived, so the Execution went against them, &c.

Now by this it appears, that the Plaintiff ought to sue out a Scire facias to revive this Judgment before he can take out any Execution thereon, because he hath shewn that the Judgment was obtained almost three Years since.

(2.) The Ca. fa. ought to be joint against all six Defendants, because the Judgment is joint, or at least a *Sci' fa'* ought to be sued against the Survivors.

(3.) That no Execution can go out of this Court, because there is no Remittitur entered on Record; and until such Remittitur is entered, the Record remains in the Exchequer Chamber, notwithstanding the Abatement of the Writ of Error, and by Consequence this Execution is without Warrant, for there is no Record of any Judgment now remaining in this Court. On

See *Isam's*
Case in *Moor.*
2 Inst. 471.
Sid. 351

Where the
Court of
Exchequer
must enter a
Remittitur,
where not.

On the other Side it was said there was no Occasion of entering a Remittitur, because the Writ of Error being abated by the Death of three of the Plaintiffs in Error, there was nothing of that Matter remaining in the Exchequer-Chamber; and that there is a Difference in the Practice where such a Writ of Error is discontinued, and where 'tis abated by Death; for in the first Case 'tis usual to enter a Remittitur, because the Continuance is Matter which appears to the Court of Exchequer-Chamber; but the Death of the Parties both not, and therefore in such Case, that Court will not enter any Remittitur upon these Records; and this was compared to a Writ of Error in Parliament, which by the Dissolution thereof is abated; and this Court may proceed to Execution afterwards without any * Remittitur.

Adjudged that the Execution in this Case may be taken out without any Sci. fa. to revive the Judgment, because the Defendants had continued the Suit by bringing a Writ of Error, and the Plaintiff was within the Year after the Abatement of the Writ of Error, and as to that Matter the Cases in the † Margin were cited.

That 'tis necessary a Remittitur should be entered to warrant the Execution from B. R. and a Day was given to the Plaintiff to procure it to be entered; for if it appeared in the Record, that a Remittitur was entered, the Court would not examine into the Time of its Entry; Quod nota.

At another Day the Plaintiff informed the Court that he could not procure the Clerk of the Errors to enter a Remittitur, and therefore it was moved, that tho' the Execution is erroneous, yet that the Court would not supersede it, but put the Defendant to his new Writ of Error, as in Winch, Rep. 100.

Sed per Curiam, Unless a Remittitur is entered, the Plaintiff must sue out a Sci. fa. Adjournatur.

Frederick *versus* Gosfright. Trin. 4. W. & M. B. R.

DEBT upon a Bond of a Thousand Pounds, conditioned to pay five hundred Pounds on the 10th Day of March 1684.

The

Econtra.

1 And. 144.
2 And. 142.

* Hob. 68.
Latch. 39.
W. Jones 66.
1 Roll. 19.
Noy 150.
Moor 361.

† 15 H. 7.
16. 6.
1 Roll. Abr.
899.
4 Leon. 197.
2 Cro. 364.
Yel. 7.
3 Cro 891.

Where Acceptance in Satisfaction is not well pleaded, unless the Defendant pleads, he gave it in Satisfaction.

The Defendant pleaded in Bar, That post confectionem scripti obligatorii prædict' & ante prædictum decimum diem Martii in conditione prædict' specificat' scil't 20 die Septembris, &c. ipse idem (the Defendant) solvit eidem (the Plaintiff) 100 l. in parte satisfactionis denariorum præd' in conditione prædicta specificat' & idem (the Plaintiff) adtunc & ibidem habuit & acceptavit de & ab eodem (the Defendant) diversa mercimonia & merchandisas per ipsum (the Defendant) pro eodem (the Plaintiff) ante tempus illud empt' & provis. in plena satisfactione & exoneratione residui denariorum prædict'.

See *Pine's*
Case. 5 Rep.

And upon a Demurrer to this Plea it was adjudged ill, because the Defendant did not plead, that he gave the Wares in full Satisfaction, but only that the Plaintiff accepted them in full Satisfaction, which cannot be, unless the Defendant gave them for that Purpose.

Felldown *versus* Beale. Pasch. 4 Willi. B. R.
Rot. 208.

The Union
of Churches
is, at Com-
mon Law, a
Consolidati-
on of the
Tithes, but
the Bounda-
ries continue
as before
the Union.

UPON a Declaration in a Prohibition, and a Demur-
rer thereunto, the Case appeared to be thus :

II. That the Parish Churches of St. Maurice and St. Mary Kalendar in the City of Winchester were united concurrentibus hiis, &c. by the Statute 17 Car. 2. cap. 3. and the Church of St. Maurice appointed to be the presentative Church; afterwards the Parish Church of St. Mary Kalendar was demolished, and Houses built on the Ground where that Church stood.

The Plaintiff Felldown was an Inhabitant within the Limits of the old Parish of St. Mary Kalendar, and not within the Limits of the Parish of St. Maurice; and now the Question was upon a Libel exhibited against Felldown in the Consistory Court of Winchester, for refusing to contribute to the Repairs of the Church of St. Maurice; and upon a Demurrer to a Declaration on a Prohibition, Whether this Union of Churches was such an Union of the Parishes, so as to make those who were Inhabitants within the Limits of St. Mary Kalendar, and without the old Bounds of St. Maurice, chargeable and contributory to the Repairs of the Church of St. Maurice.

And it was argued for the Plaintiff, that an Union of Churches intended no more at Common Law than a Consolidation of the Tithes, but that the Bounds thereof continued distinct as before the Union; for an Union is always with Respect to and for the Benefit of the Parson, and not to confound the Distinction of Parishes, but that they shall remain * separate to all Purposes, notwithstanding the Union; and besides, 'tis provided by the said Statute 17 Car. 2. that the Parishes shall remain separate.

* 40 Ed. 3. 8.
12 H. 8. 8. b.
30 Ed. 3. 27.
Hob. 67.
Dyer 259.
W. Jones 182.
F. N. B. 39.
3 Cro. 500,
720.
1 Cro. 429.

But on the other Side it was argued, that this was a different Case from that in Hob. 67. for that was where both Churches were in Being, and so remained after the Union; but here one Church was demolished and gone, so that if the Plaintiff should not be contributory to the Repairs of the Church of St. Maurice, where he hath all Parochial Privileges, (viz.) a Seat in Nave Ecclesiæ, Christning, Burial, &c. he will be discharged from a Contribution to the Repairs of any Church whatsoever; and 'tis unreasonable that he should have the Benefit of the Church in Conjunction with the rest of the Parishioners, and at their Charge.

† 32 H. 6. 22.
2 Inst. 489.
Poph. 197.

And therefore the Proviso in the Statute 17 Car. 2. must be intended to extend only to such Cases where both Churches remain and are in Being after the Union; and if so, then 'tis not reasonable that the Parishioners of one Church should contribute to the Repairs of the other Church, because they are chargeable to the Repairs of their own Church.

But the Court inclined to continue the Prohibition for the Reasons *supra*.

The King *versus* Inhabitants of Hermitage & al'.

At a Trial at Bar in B. R. Hill. 3 W. & M. the Case was:

II. A Distringas and Inquisition was returned at the Prosecution of one Micoe, upon the Statute of Westm. for throwing down Enclosures notwithstanding; and by the Inquisition it was found, that 100 Perches of Hedge, 100 Perches of Pale, 10 Stiles, and 20 Gates of the Inclosure of 300 Acres of Land, called Hermitage Common in Dorsetshire, were destroyed, and that Micoe the Prosecutor had a Term for Years therein, and was thereby damnified 360 l. and

farther,

Where a Prescription was pleaded, and the Defendant failed in it.

Cro. Car.
280, 439, 580.
1 Mod. 66.
Sid. 107.
1 Lev. 108,
of the Pleading and Issue.

farther, that the Villages of Hermitage, Holnest, Hilvill, Hartley, Minterne Magna and Midlemarsh were the Vill next adjacent.

Whereupon the Inhabitants of these Villages appeared and pleaded thus:

(1.) *¶* The Vill of Holnest pleaded, that A. and B. the Servants of the Prosecutoꝝ, committed this Fact secretly, and with the Privy and Collusion of their Master the Prosecutoꝝ, and traversed, that Malefactores ignoti did it prout in the Inquisition, and Issue was taken upon this Traverse.

(2.) The Inhabitants of Hermitage pleaded, that the Manor of Fordington in Dorsetshire is Parcel of the Demiesnes of the Duchy of Cornwall, and that the King, &c. was seised of that Manor in Fee, as Parcel of the said Duchy, and that Hermitage Common in qua, &c. was Parcel of the said Manor; and that all the Tenants of any Tenements held of the said Manor, lying in the Vill of Hermitage, have Time out of Mind had Common of Pasture for all their Cattle levant and couchant, &c. at all Times of the Year, in Hermitage Common, and that the Prosecutoꝝ de son tort had enclosed it, so as they could not enter, &c. and had not left them sufficient Common; and Issue was taken upon this Prescription modo & forma, &c.

(3.) The Inhabitants of Hilvill and Hartley join in their Plea, which was much the same as pleaded by Holnest, and Issue thereon, ut supra.

(4.) The Inhabitants of Minterne and Midlemarsh likewise join in their Plea, that the aforesaid A. and B. the Servants of the Prosecutoꝝ, did the Fact, and that an Indictment was preferred against them at the Quarter Sessions, within a Year after it was done, which Indictment was found, and that the Prosecutoꝝ had Notice of it.

To this Plea there was a Demurrer.

(5.) Then they all join and plead, that the Damages found by the Inquisition are unreasonable and excessive, and that Micoe the Prosecutoꝝ did not sustain Damages in ea parte ultra quinq; libras & de hoc pon. se super patriam, &c.

And upon Evidence at the Bar, these Things appeared.

First, That all the Tenements in Hermitage, unto which the Common of Pasture was claimed, were heretofore Parcel of the Abbey of Sarum, and that by the Dissolution

lution of that Abbey the same came to H. 8. before the Birth of Ed. 6. so that the Duchy of Cornwall was likewise at the same Time in the Possession of H. 8. for Want of a Duke of Cornwall; and hereby an Unity of Possession, both of the Tenements to which the Common of Pasture appertained, and also of Hermitage Common, the Place where the Common of Pasture was to be had, was at that Time in King H. 8.

And it likewise appeared, that the Tenements in Hermitage were granted to the several Tenants after the Unity of Possession; and hereupon the Counsel for the Prosecutor insisted, that by this Unity the Prescription was destroyed, and the Common of Pasture quite extinct.

But after much Debate it was unanimously resolved per Holt Ch. Justice, and the whole Court, that this was not such an Unity of Possession as would destroy the Prescription; for though King H. 8. had an Estate in Fee in the Lands a qua, and also in the Lands in qua, yet he had not as perdurable an Estate in one as he had in the other; for the Quality of the Estates differed, because in the Manor of Fordington, which was Parcel of the Duchy of Cornwall, and in Hermitage Common in qua, &c. which was Parcel of that Manor, King H. 8. had only a Fee determinable on the Birth of a Duke of Cornwall, which is a base Fee; but in the Tenements in Hermitage, Parcel of the Abbey a qua, he had a pure Fee-simple indeterminable jure Coronæ, and therefore an Unity of such Estates works no Extinguishment; for where an Unity of Possession doth extinguish a prescriptive Right, 'tis requisite that the Party should have an Estate in the Lands a qua, and in the Lands in qua, equal in Duration, Quality, and all other Circumstances of Right.

Farther, upon Evidence it appeared, that the Tenants of Tenements in Hermitage, had Time out of Mind, Common of Pasture in Hermitage Common for all their Cattle levant and couchant, &c. at all Times in the Year (Sheep only excepted for a certain Time).

And upon this it was resolved by the Court, that they had failed in their Prescription, and that the Evidence would not maintain the Plea, for that was for Common for all Cattle, &c. at all Times in the Year, when by the Evidence it appears, that Sheep were excepted for some Time in the Year; therefore the Prescription ought to have been specially pleaded, with this Exception.

It also appeared upon the Evidence, that no more than 3 Perches of Hedge and Fence, and 9 Gates, and 3 Stiles were destroyed and pulled down, tho' the Inquisition had found 100 Perches, and 20 Gates, and 10 Stiles pulled down.

But per Curiam, this Matter cannot be inquired into, because the Defendant had not traversed the Number, and so that was not in Issue; quod nota; for it was an Oversight in the Pleadings.

Upon the whole Matter, the Jury gave their Verdict for the Prosecutor, because the Defendant had failed in his Prescription for Common, which was the principal Matter relied on, and 20 l. Damages against the Defendants; and thereupon a Writ went out against them to levy the Fences, and to repair, &c.

But this Verdict was more beneficial to the Defendants than if it had been found for them, because the Prosecutor paid the Jury 65 l. who came up from Dorsetshire in very bad Weather, and the Repairs which the Defendants were to make good would not amount to 10 l. and by a Rule of Court Nisi prius, Costs were to be paid by both Sides by Consent.

Quære, If any Costs ought to be paid by the Defendants in this special Case, for the Statute of Westminster doth not mention any Costs, and this is upon Traverses of Inquisitions: This Point was started and moved to the Court, but no Resolution thereon, because the Court held that the Parties were concluded by the aforesaid Rule made by Consent.

D E

Term. Sanct. Trin.

4 Willi. & Mariæ, B. R.

Butcher *versus* Porter. Hill. 4 W. & M. B. R.
Rot. 292.

W RIT of Error upon a Judgment in Replevin, in Windsor Court, where the Defendant had pleaded in Bar, that the Property of the Goods taken was in a Stranger, and not in the Plaintiff.

To this Plea there was a Demurrer, supposing it ought to have been pleaded in Abatement, and not in Bar, and the Judgment was there given, that the Plea was good.

And now the Plaintiff in Error objected, that the Judgment given in Windsor Court, was informal and naught, it being quod querens nil capiat per narrationem suam, instead of querelam suam.

(2.) Exception was, That the Judgment was partial and defective, for it was only, that querens sit in misericordia, when it ought to be quod querens & * plegii sui de prosequendo sint in misericordia.

Pledges are only Sureties to the King, for the Plaintiff's Amerciament, and ought not to be amerced themselves. 4 Inst. 180, 596 Plowd. 274. The Precedents are both Ways. Rast. Ent. 557. a. 562. 570. Co. Ent. 589, 591, 595. a.

(3.) Exception, That this Plea of Property in a Stranger, is a Plea in Abatement, and not in Bar, or at least

1 Salk. 94.
Plea of Property of Goods in a Stranger well pleaded in Bar, and not in Abatement.

* Nota, The Judgment was Right, for the

* 2 Roll. Abr.
433.
9 H. 6. 4.
Bro Retorn'
Aver' placit-
to 1, 3, 31.
39 H. 6. 35.
3 H. 6. 3..

If good in Bar, the Defendant should have made an Avowry pro Retorn' habend' which he hath not done, and for this the Cases in the * Margin were cited.

(4.) Exception, It appears upon the Record, that the Plaintiff was levied before the Taking the Goods; and therefore the Judgment ought to have been against the Plaintiff, quia querela insufficient' in Lege, and not quia placitum sufficiens, &c.

Sec per Curiam, as to the first and last Exceptions they are good, and the Judgment for the Reasons supra is erroneous; and therefore the Court would have reversed it, but that such Reversal would be no Advantage to the Plaintiff, because upon the Reversal of an erroneous Judgment, this Court must give such a proper Judgment as they ought to have given below, which is, that the Plaintiff shall abate, and that the Defendant have a Return of the Goods, and this because it appears, that the Plaintiff was levied before the Plaintiff had any Cause of Action.

As to the second Exception the Court did not take any Notice of it.

And as to the third Exception they held, That the Plea was well pleaded in Bar; and Holt Chief Justice remembered a Case adjudged between * Wildman and North, wherein the Defendant in Replevin pleaded Property in himself, in Bar to the Action, and there per Hale Chief Justice, it ought to be so pleaded, and not in Abatement; and farther, that such Plea in Property in himself, did not amount to the general Issue of non cepit.

And it was agreed in that Case by the whole Court, that Property in a Stranger might be pleaded either in Bar or Abatement at the Election of the Pleader.

Resolved in the Case at Bar, That where the Defendant, in Replevin pleads Property in himself, or in a Stranger, there he need not make any Avowry pro Retorn' habend', because the Plea it self doth comprehend good Cause for a Return, since the Plaintiff hath no Property.

And the Difference is where the Plea goes to the very Point of the Writ as here, and where 'tis only collateral Matter, as Prist in autre lieu, for there a Suggestion must be made in Nature of an Avowry pro Retorn' habend', because the Plea in it self doth not contain any Matter for a Return, for tho' it may be true, yet the Taking may be tortious.

The Judgment supra was reversed, and a new * Judgment given, (viz) that the Plaintiff should abate, and that the Defendant should have a Return, &c. Quod nota.

2 Cro. 519.
2 Roll. Rep.
64.

* See the
Form of such
a Judgment
in Rep. Est.
57c. a.

Gree *versus* Oliver. 4 W. & M.

THIS was an Ejectment tried before Holt Ch. Justice, at the Assises in Exon' upon the Demise of Anthony Mapowder, and upon the Evidence, the Case was as followeth:

Where the Heir was sued on a Bond of his Ancestor.

¶ Isaac Burch the Father died seised in Fee of the Lands now in Question, after whose Death Anth. Mapowder, the Lessor of the Plaintiff, filed an original Writ upon a Bond of 800 l. against Isaac Burch his Son and Heir, and had Judgment thereon in Trin. Term, 2 Jac. 2. by Default; and thereupon a general Elegit issued against all the Lands and Tenements of Isaac Burch the Son and Heir, by which a moiety of all his Lands in general were extended and delivered to Mapowder, which was his Title.

The Title of the Defendant was likewise by a Judgment obtained upon a Bill filed in B. R. in Hill. Term, 1 & 2 Jac. 2. which was precedent to the Judgment of the Lessor of the Plaintiff; and this was upon a Bond for 100 l. to which the Heir pleaded Riens per descent prater the Lands in Question; and thereupon Oliver the now Defendant took his special Judgment against the Assets confessed by the Heir; but this was subsequent to Mapowder's Judgment, (viz.) in Trinity-Term, ann. 3 Jac. 2. and hereupon the now Defendant Oliver had an Extendi facias of the whole Lands in Question, and was put in Possession of the whole by the Sheriff.

And upon this Evidence the Question was;

¶ If a Judgment against an Heir upon Assets confessed, shall bind the Lands from the Time of the Judgment given only, or else shall relate to the Time of the original Writ or Bill filed.

And per Holt Ch. Justice, This special Judgment against the Assets only, shall have Relation unto, and bind from the Time of the filing the original Writ or Bill.

1 Mod. 153.
not Law.

That the filing a Bill in B. R. was as effectual for this Purpose as an original Writ; therefore the Defendant Oliver's Bill being precedent to the Judgment of Mapowder (Lessor of the Plaintiff,) his Title must have the Precedency, for Mapowder could give no Account of the Time of filing his Original.

But admitting Mapowder's original Writ was actually filed before Oliver the Defendant's Bill, yet his (the Defendant's)

dant's) Title will be good against Mapowder, because the Judgment under which he (Mapowder) claims, is a general Judgment against the Heir; and the Execution a general and common Execution by Elegit, and not against the Assets only by way of Extent.

And such a general Judgment will not operate by way of Relation to the Original, but binds only in common Cases from the Time of the Judgment given.

The Plaintiff was Nonsuit.

Holman *versus* Exton. Exon *Summer Assises*,
4 W. & M. coram Holt Chief Justice.

If a Person
absents him-
self for 7
Years, and
no Proof can
be made,
that he is a-
live, he
shall be pre-
sumed to be
Dead.

IN Ejectment the Case was thus:

St. John Gifford was seised in Fee of the Lands in Question, and made a Lease in Reversion to Lewis Davells for 99 Years to commence after the Deaths, or other sooner Determination of the Estates of John Davells the Father, and John Davells the Son, who had then a Lease in Possession for 99 Years, if they or either of them so long lived.

The Plaintiff positively proved the Death of John Davells the Son, but as to the Father, the Proof was, that he had been reputed Dead, and no Body had heard of him for 15 Years last past.

And upon an Objection, that this last Proof was insufficient, it was held clearly by Holt Ch. Justice, upon the Perusal of the Statute, by which 'tis enacted, That if any Persons, for whose Lives Estates are granted, absent themselves 7 Years together, and no evident Proof be made of their Lives in any Action commenced by the Lessors or Reversioners for Recovery of the Tenements, they shall be accounted as Dead; that this Case is within that Statute, because Lewis Davells the Lessor of the Plaintiff had a Term in Reversion in the Lands, and so was a Reversioner within the very Letter of the Statute, and he held that a Remainder Man was within the Equity of that Law.

Wherefore in the present Case, the Defendant being not able to prove that John Davells the Father was alive at any Time within seven Years last past,

The Plaintiff had a Verdict.

19. Car. 2.
cap. 6.

D E

Term. Sanct. Mich.

Anno 4 Willi. & Mariæ in B. R.

Hilman & Ux. *versus* Hore. Trin. 4 Will. &
Mar. in B. R. Rot.

DEBT for Rent, in which the Plaintiff declared upon a Lease by Indenture made between the Plaintiff and the Defendant, upon the 29th Day of January, Anno 36 Car. 2. Habendum for forty Years, to commence from the 3d Day of May next before the Date, &c. rendring Rent, by Virtue of which Lease the Defendant entered and was possessed, &c. and for six Years Rent in arrear this Action was now brought.

Where the
Party shall
be estopped,
where not.

The Defendant pleaded in Bar, that before the Making the Lease in the Declaration set forth, the Plaintiffs (being possessed of the Premises for a Term of ninety-nine Years) made a Lease thereof by Indenture, (viz.) 3 Maii, 35 Car. 2. unto one William Northmore for forty Years, to commence presently, by Virtue of which Lease, the said Northmore, (before any Rent became due on the Lease, in the Declaration set forth, (viz.) 1 die Maii, Anno 36 Car. 2.) entered, and was possessed, and alledged in fact, that the said Lease made to Northmore, was still in Being, and not determined, by Reason whereof she (the Defendant) stood liable to the Action of Northmore, for all the Issues and Profits of the Premises by her had and received.

And upon a general Demurrer to this Plea, the Question was:

Whether

* 1 Inst. 47. &
Cro. Eliz.
700.
Brereton v.
Evans.

Whether the Defendant was estopped by the Indenture to plead this Plea; and it was insisted for her, that she was not estopped, because it appeared on Record, that an Interest did pass to her by this Indenture from the Plaintiffs, (viz.) a good Lease in Reversion for one Year, after thirty-nine Years (which was the Residue of Northmore's Term) determined; and that it is a Maxim in Law, that a Deed cannot operate thro' several Ways, (viz.) by passing an Interest, and also by Conclusion; but that if any Interest passes by the Deed, the Estoppel is taken away; and for this Purpose the Cases in the * Margin were cited.

Sed per Curiam, The Defendant is estopped to plead the Matters supra; and there is a Difference where the Indenture immediately passeth such an Interest as was intended by the Parties; and afterwards by some Matter ex post facto, that Interest is determined by an Extinguishment of the Estate of the Lessor, out of which the Lease was derived; there the Parties are not estopped to shew the special Matter.

Or in Case where a Lease is made to A. for forty Years, who enters, and the Lessor enters and turns him out, and then makes a Lease of forty Years to B. who enters, and then A. the first Lessor re-enters, and both these Leases are by Indenture; in this Case B. in an Action of Debt brought against him for Rent reserved on his Lease, may plead the whole Truth, and is not estopped; because such an Interest passed by the Indenture as was intended, (viz.) a Term for forty Years; but the Lessor's Estate, out of which that Interest was derived, being by Disseisin, was by the Re-entry of A. determined, and by Consequence so was the Term out of which it was derived.

1 Leon. 33,
59.
Plowd. 421 b.
433. Smith
v. Stapleton.

Nota; In the Case at Bar, if the Lease to the Defendant had been by Deed Poll, or by Parol, the Plea supra had been a good Bar.

Chapman & al' *versus* Butcher. Mich. 4 Will.
& Mar. B. R. See antea Porter *versus* Butcher.

The Condi-
tion of a
Bond in Re-
plevin, good.

THE Plaintiffs being late Bailiffs of the Borough of New Windsor, brought an Action of Debt on a Bond of 200 l. against the Defendant, who craved Oyer of the Bond and Condition, upon which it appeared to be a Bond taken by the said Bailiffs of; and from the Defendant and one Piles, upon a Replevin.

1

The

The Condition was, that if the above-bounden *John Butcher*, do and shall prosecute and follow, with Effect, his Suit commenced in the Court of Record of the Borough of *New Windsor*, against *Thomas Porter*, for the unjustly Taking and Detaining the Goods and Chattels of the said *John Butcher*, (*viz.*) at *New Windsor*, within the Jurisdiction of this Court, and do and shall make Return of the said Goods and Chattels, if a Return thereof shall be adjudged by Law against him, then this present Obligation to be void, or else, &c.

And after Oyer the Defendant pleaded, that he had prosecuted the Suit in the Court of Windsor, with Effect, ita quod judicium superinde habitum fuit, but that he (the Defendant) brought a Writ of Error thereon in B. R. where the Judgment was reversed, as by the Record it appears.

The Plaintiff replied Protestando, that the Defendant did not prosecute his Suit with Effect, pro placito dicit, that the Judgment below was, that Porter, the Defendant, should have a Return, and that before any Return was made, the Defendant brought a Writ of Error, upon which the Judgment was reversed; but that it was then farther adjudged by this Court, that the Plaintiff in New Windsor Court should abate, and that the aforesaid Porter should have a Return irrepleviable.

And upon a Demurrer to this Replication it was objected, that this was an unlawful Bond, because the Bailiffs ought to have taken Pledges, and not a Bond.

But admitting the Bond to be good, yet the Condition doth not extend to any Judgment of Return Habend. in any Court, but only in Windsor Court, where the Plaintiff was levied, and the Judgment of that Court is now reversed.

Sed per Curiam, This is a lawful Bond, and 'tis the common Course, even at this Day, to take such Bonds, and the Condition is well penned, all the Words being general; the first Part is, if he prosecute his Suit commenced, with Effect, in the Court of Windsor, which Words are not bound up to a Prosecution only in that Court, but extend to the Prosecution of a Writ of Error in B. R. for that is a Part of the Suit commenced below.

And the latter Words are as general, (*viz.*) And do make Return, &c. if a Return be adjudged by Law, so as 'tis not confined to the Judgment of any particular Court; and for these Reasons,

The Plaintiffs had Judgment.

Sir Simon Leech's *Case*, antea.

3 Lev. 284.
2 Vent. 199,
the Case and
his Argument.

ONE Leech was Tenant for Life, Remainder to his first Son in Tail, Remainder to Sir Simon Leech in Fee; the Tenant for Life (before the Birth of any Son) executed a Deed of Surrender of all his Estate and Title, &c. to Sir Simon Leech, and delivered this Deed to T. S. to the Use of Sir Simon; and all this was done without the Knowledge of Sir Simon.

Afterwards Leech, the Tenant for Life, had a Son, after the Birth of which Son, and five Years after the Deed of Surrender was executed, and not before, Sir Simon Leech having Notice of the said Surrender, accepted it, and assented to it; all which was found by a special Verdict in Ejectment, brought by the Son of Leech, Tenant for Life, against Sir Simon Leech.

The Asson being in the C. B. three Judges, after several Arguments, gave Judgment for the Plaintiff, for they held that the Consent of the Surrenderee is absolutely necessary to every Surrender, and that before such Assent nothing passeth out of the Surrenderor; and therefore in this Case, the Birth of the Son happening between the Delivery of the Deed and the Assent of the Surrenderee, the Surrender it self was defeated by the vesting of the contingent Remainder, so that the subsequent Assent of the Surrenderee signified nothing, because at that Time the Tenancy for Life could not be surrendered to the remote Remainderman, because of the mean Estate vested.

But Justice Ventris was of a contrary Opinion, for he held, that by the Delivery of the Deed the Estate passed to, and vested immediately in Sir Simon Leech, and should wait there till his Dissent, and not remain with the Surrenderor till he (the Surrenderee) should assent; for the Law will intend the Assent of the Surrenderee, because 'tis for his Benefit.

But the Plaintiff had Judgment by the Opinion of the other 3 Judges, upon which Judgment a Writ of Error was brought in B. R. and the Judgment was affirmed *una voce*.

And afterwards a Writ of Error was brought in Parliament, and there this Judgment was reversed, notwithstanding all the Opinions of the Judges Assistants for affirming the Judgment, except the Chief Baron Atkyns, who was for reversing it.

Buckley & ux' *versus* Collier. Mich. 4 W. & M.
B. R. Rot. 20.

Indebitatus assumpsit by Husband and Wife, in which they declare that the Defendant indebitatus suet to them (the Plaintiffs) in such a Sum of Money for Periwig-maker's Work done by the Wife, at the Request of the Defendant, and concludes ad damnum ipsorum, &c.

4 Mod. 156.
Where the
Action ought
to be brought
by the Husband
alone.

The Defendant pleaded a frivolous Plea, to which the Plaintiff demurred: and the Question was, Whether this Action was well brought by Husband and Wife, or whether it ought to be by the Husband alone.

It was insisted, that they ought to join in this Case, because the Cause of Action did arise from the particular Skill of the Wife in making Periwigs, and for which she might have an Action after the Death of her Husband, and for that Purpose the Cases in the * Margin were cited.

* 2 Cro. 77.
Cro. El. 61,
96.
Cro. Car.
439.
2 Sid. 128.

To which it was answered, and so resolved, that this Case differs from those cited, because those are upon special Promises made to the Wife only, and therefore in such Cases the Wife must be a Party to the Action; but here the Action is upon a general Indebitatus assumpsit on a Promise implied by Law; but that the Law will not in this Case imply any Promise to the Wife, for she is a Servant to the Husband, who is at all the Charge in providing Materials, as Hair, &c. to carry on the Trade of Perwig Making; therefore he ought to have the Recompence, so that the Law implies the Promise was made to him only; quod nota.

Judgment quod querens nil capiat.

Bartlett *versus* Vinor.

Assumpsit, &c. in which the Plaintiff declared, That the Defendant in Consideration that the Plaintiff would procure 15000 l. to be lent to the King, &c. upon an Act of Parliament for the Pound-Rate, in the Name of the Defendant, or of such other Person as he (the Defendant) should agree to, he (the Defendant) would pay unto the Plaintiff 600 l. and the Plaintiff avers, that he procured 15000 l. to be lent to the King, &c. by Sir Walter Plummer, in the Name of Sir Walter Plummer, by Agreement of the Defendant, and now this * Action was brought for the 600 l.

Where the
Consideration
of a Promise
was
neither usurious
or
extortive.

* Yelv. 87.
Hutt. 56.
1 Cro. 461.
2 Roll. Rep.
103.
Stile 412.

K k 2

Upon

Upon non assumpsit pleaded, the Plaintiff had a Verdict, and it was moved in Arrest of Judgment, that the Consideration of this Promise was extorsive and usurious, and by Consequence unlawful, or at least, that this was Brocage, and so prohibited by the last Statute against Usury.

But after Debate it was resolved per Curiam, that this Consideration was neither extorsive or usurious, neither was it Brocage within the Intent of that Statute; for here neither the Borrower or the Lender was to pay the 600 l. Præmium, but a third Person.

And per Holt Chief Justice, If A. owes B. 100 l. who demands his Money, and A. acquaints him, that he hath not the Money ready, but is desirous to pay it if B. can procure it to be lent by any other Person; and thereupon B. having present Occasion for his Money contracts with C. that if he will lend A. 100 l. he will give him 10 l. and hereupon C. lends the Money, and the Debt is paid to B. this is a good and lawful Contract between B. and C. for B. hath Benefit by it.

And the Plaintiff had Judgment.

Nota; The Truth of the Fact was, Vinor (as Executor to Sir Robert Vinor) had a considerable Sum of Money in the Exchequer, which being a Debt of King Charles II. was somewhat desperate; and now by procuring this 15000 l. to be lent to King William, the Defendant had Callies for 6000 l. of his old Debt, and this being proved at the Trial, it made the Consideration better.

Every Contract made for any Thing prohibited by a Statute is void, though the Statute only inflicts a Penalty.

Nota; Per Holt Ch. Justice, every Contract made for or about any Matter or Thing which is prohibited and made unlawful by any Statute, is a void Contract, tho' the Statute it self doth not mention that it shall be so, but only inflicts a Penalty on the Offender, because a Penalty implies a Prohibition, tho' there are no prohibitory Words in the Statute.

As for Instance; In the Case of Simony, the Statute only inflicts a Penalty by Way of Forfeiture, but doth not mention any avoiding of the simoniacal Contract; yet it hath been always held, that such Contracts being against Law are void.

So be held, that if a Scrivener contracts for more than five Shillings for procuring the Loan of 100 l. such Contract is void.

Baker *versus* Lade. Trin. 3 W. & M. B. R.
Rot. 268.

IN Replevin, &c. the Defendant made Conusance for Arrears of a Rent-Charge, and set forth that one Robert Lade was seised in Fee of the locus in quo, &c. and by Indenture granted a Rent-Charge in Fee to Nicholas Marsh, who devised it to his Son Rich. Marsh in Fee, who by Deed indented, in Consideration of natural Love, and of 5 s. in Money to him paid by his Son Nich. Marsh, dedit & concessit predicto Nich. Marsh filio & heredibus suis the afore-said Rent, as by Indenture produced it appears, Quæ quidem concessio ult. mentionat. nullo attornamento nec alia executione superinde facta existen. præter solam sigillation. & deliberationem inde operavit per viam conventionis prædictæ. Rich. Marsh stare seisit ad usum in eadem concessione mentionat. per quod & vigore statuti in usibus, &c. the said Nich. Marsh the Son was seised of the said Rent-Charge in Fee, and the Defendant as his Bailiff distrained for Rent Arrear.

And upon a Demurrer to this Plea in C. B. the Defendant had Judgment in this Form, (viz.) Quod querens nil capiat, &c. & quod Defendens ear inde sine die & quod habeat Retorn. averiorum prædict. detinend sibi irreplegiabile in perpetuum & super hoc prædict. (the Defendant) per statutum, &c. petit breve ad inquirend &c. concerning the Arrears of the Rent, and the Value of the Cattle, according to the Oxford Act, and thereupon Judgment, &c.

And upon a Writ of Error brought in B. R. the first Error was assigned ore tenus, (viz.) That the Avowry was ill in the Pleading the Conveyance of the Rent from Richard Marsh to his Son Nicholas Marsh, it being quod dedit & concessit, which is by way of Grant, to which the Attornment of the Tenant is necessary; and there being no Attornment alledged, therefore 'tis a void Grant.

That 'tis an idle Allegation, for the Defendant to say, that this Deed operates by way of Covenant to stand seised, for though a Deed may operate several Ways, and 'tis in the Election of the Party to use such a Deed according to any particular Operation for his Purpose; per

2 Vent. 147,
150, 160.
3 Lev. 291.
4 Mod. 149.
Where a
Deed is
pleaded as a
Grant, and
no Attorn-
ment of the
'Tenant,' tis
ill.

Affirmation on
two Promises
for, and on
the Damages
when one of
the Promises
was void.

11 H. 6. 28. b.
4 Inst. 111,
112.
2 Leon. 121.
See postea
Osman v.
Sheafe.

yet the Deed must be pleaded as such a Conveyance properly, which works for his Purpose; and therefore in this Case the Defendant should have pleaded this Deed, as a Deed of Covenant to stand seised, and not as a Deed of Grant; for every Deed must be pleaded expressly according to its Operation, and not according to the Words at large.

(2.) The second Error was, That the Judgment is double (viz.) one at common Law, and the other by the new Statute; and in this Case where the Abowant proceeds on the Statute, and hath Judgment, there ought not to be any Judgment de Retorn' habend', for that is the Judgment at Common Law.

Sed per Curiam, the Statute doth not alter the Judgment at Common Law, but only gives a farther Remedy, so as to that Point the Judgment is well given.

But it was resolved, that the Judgment was erroneous in the Matter assigned for the first Error; for that the Defendant had pleaded this Deed as a Grant, and had not shewn any Attornment of the Tertenant; for if the Plaintiff had taken Issue upon Concessit, the Defendant could not have maintained it by the Covenant to stand seised, and for that Error only the Judgment was reversed.

And a new Judgment was given by the Court for the Plaintiff in Replevin, (viz.) quod recuperet damna, &c. as it ought to be, where the Plaintiff in the Action brings a Writ of Error; but 'tis otherwise where the Defendant in the original Action brings a Writ of Error, for in such Case 'tis quod judicium revertetur.

Blackman *versus* Cobbet. Mich. 3 W. & M.
in C. B. Rot. 456. reversed Trin. 5 W. & M.
in B. R.

Action on
two Promi-
ses, and en-
tire Damages
when one of
the Promises
was void.

WRIT of Error on a Judgment in C. B. on an Action on the Case upon two several Promises by Cobbet the Plaintiff in the original Action against Blackman as Administrator to T. S.

The Defendant pleaded plene Administravit, and a Verdict was found against him, and now it was assigned for Error, that entire Damages were given upon the two Promises, whereof one was void, for that it was laid as followeth:

J. In

ff. In Consideration that the Plaintiff had sold a Mare to the Intestate, he promised to pay the Plaintiff tantam denariorum summam quantum Equa prædicta rationabiliter habere meruit, and then avers in Fact, quod Equa prædicta rationabiliter habere meruit 8l. which is absurd to say, that the Mare deserved to have so much Money, and therefore this Promise is void.

And the Court was of this Opinion, wherefore the Judgment was reversed.

Fontzell *versus* Burrows. Pas. 5 Will. & Mar.
B. R. Rot. 99 vel 100.

THIS was an Action on the Case upon a Goldsmith's Note, brought by the Indorsee against the Drawer for twenty Guineas; and the Breach of the Promise assigned was for Non-payment de prædictis peciis Auri vocat. Guineas generally, and did not alledge the Value thereof.

And upon a Demurrer to the Declaration, the Defendant assigned for Cause, that no Value was set on the Guineas, which ought to be, because they are an uncertain Coin.

Sed per Curiam, The Declaration is good, because the Action is brought for Damages, and the Value of the Guineas may be given in Evidence to the Jury.

But if it had been an Action of Debt for so many Guineas, there the Value of them must be set forth in the Declaration, so as to ascertain the Debt.

Judgment for the Plaintiff.

In an Action of Debt for so many Guineas, the Value must be ascertained; otherwise in an Action on the Case for Damages.

Huckle *versus* Wye.

Covenant against Wye as Assignee of one Searle, in which the Plaintiff declared upon a Demise of Lands by Indenture for thirty Years, made by the Ancestor of the Plaintiff (whose heir he is) unto Searle, virtute cujus Searle entered and was possessed, & sic inde possessionat. existen. tenementa prædicta cum pertin. superius dimiss. ante finem termini prædicti scilicet tali die, &c. ad manus & possession. (of the Defendant) per medias assignationes devenerunt virtute quarum quidem assignationum præd. (the Defendant) in tenementis prædict. intravit & fuit inde possessionat. pro residuo

Infant, where he must sue per Guardianum.

residuo termini 30 Annorum prædict. tunc ventur. & inexpirat. &c.

There was Judgment against the Defendant by Default, and upon the Return of the Writ of Inquiry, it was moved in Arrest of Judgment :

(1.) That the Plaintiff being an Infant, had sued by his Guardian, but the Entry on the Roll was no more, but per T. S. guardianum suum, omitting the Clause ad hoc per Curiam specialiter admitt. as the common Course is, and as it ought to be here.

Sed per Curiam, The Entry is sufficient, for in Fact, if the Guardian was not admitted by the Court, a Writ of Error lies, &c.

Venue, where it need not be laid.

(2.) There is no Venue laid where the Assignments were made :

Sed per Curiam, There is no Need of laying any Venue, because an Assignment is always intended to be made on the Lands assigned.

Pleading an Assignment of a Lease, not good.

(3.) The Declaration will not maintain this Action against the Defendant, because it was not shewn, that he (the Defendant) was Assignee of the Term of Searle the Lessee, but only that the Tenements came to the Defendant by Assignment, which might be an Assignment of another Estate than this Term of Searle; and the Words Virtute quarum, &c. will not help it, for those are only by Way of Inference, and not traversable, and such a Conclusion which is not warranted by the Premises.

Et per Curiam, This is a material Exception, &c.

D E

Term. Sanct. Hill.

4 Willi' & Mariæ, B. R.

Symonds *versus* Cudmore.

IN a special Verdict in Ejectment, the Case was as followeth :

ff. Sir Nicholas Martin was Tenant for Life of a Messuage, &c. in the City of Excester, with a Power to make a Lease of the same for three Lives; or for any Term of Years determinable upon the Death of three Persons only, Remainder to William Martin his Son and Heir in Tail, Remainder in Fee to the right Heirs of Sir Nicholas, who in Pursuance of the said Power, made a Lease of the Premises to Clement Westcomb for 99 Years, if A. B. and C. or either of them should so long live.

Sir Nicholas died, and William Martin, his Son and Heir, being seised in Tail of the Reversion, after the Determination of that Estate for Years, and with a Remainder in Fee to himself as right Heir to Sir Nicholas, did by Deed, reciting the former Lease of ninety-nine Years, and also that A. B. C. were then living, lease the Reversion to Elizabeth Westcomb for ninety nine Years, if G. or W. or either of them should so long live, to commence after the Determination of the first Lease made by Sir Nicholas.

Afterwards, and during the Continuance of the first Lease, William Martin died, and the Reversion aforesaid descended to Nicholas Martin Esq; the Son and Heir of William Martin; which Nicholas being so seised, (viz.) in

L 1

Tail,

4 Mod. S. C.
1 Salk. 338.
S. C.
Tenant in
Tail, Re-
mainder in
Fee, levied
a Fine, &c.

Tail, with a Remainder in Fee, levied a Fine thereof to Carew and St. Aubin, with Proclamations, &c. to the Use of the said Nicholas and his Heirs, to enable him to make a Marriage Settlement.

Afterwards, the first Lease made by Sir Nicholas the Grandfather, determined, and then the Term and Interest of Elizabeth Westcomb, by the second Lease made by William Martin, the Father of the Cognisor, was assigned to the Defendant Cudmore, who entered, and thereupon Nicholas Martin the Son (and the Lessor of the Plaintiff) re-entered, and made a Lease to the Plaintiff.

The single Question was, If Nicholas Martin, the Son and Heir in Tail of William Martin, might now avoid this Lease of the Reversion made by his Father, who was Tenant in Tail, with a Remainder in Fee, *ut supra*, or else, Whether Nicholas the Son (and Lessor of the Plaintiff) by levying the Fine, had destroyed his Power and Election to avoid the Lease, so as now he was concluded during the Term.

And after several Arguments, the following Points were agreed and resolved by the whole Court.

(1.) That this Lease for ninety-nine Years in Reversion made by William Martin the Father, was not within the Power reserved, because the Premises were charged by that Lease for five Lives, whereas the Power extended to Three, and no more.

Dyer 51. b.
1 Inst. 46. b.

(2.) That this reversionary Lease was not void in its Creation, but only voidable by the Issue in Tail.

Dyer 279.
2 Cro. 458.

(3.) If Tenant in Tail make a Lease of any of the Lands entailed to commence after his Death; this is a void Lease *ab initio*.

Cro. Car.
103.
Hutt. 96.
1 Rep. 47.

(4.) When William Martin, the Father, made this reversionary Lease, it issued out of both his Estates, (*viz.*) as well out of the Remainder in Fee as out of his Estate-tail.

* 2 Leon. 37.
3 Rep. 51. b.
2 Cro. 689.
1 Cro. 478.
Hob. 258.
Dyer 115.
Plowd. 360.
1 Rep. 49. b.
2 Bulst. 45.
W. Jones 33.

(5.) That this Fine with Proclamations hath not only barred, but extinguished the Estate-tail, as much to all Intents as if Tenant in Tail had died without Issue; for otherwise the Cognisee must have two distinct Estates in Fee, (*viz.*) a base Fee determinable upon the Death of the Tenant in Tail, without Issue, and also an absolute Fee; which is very absurd; and therefore the greater Fee, which is absolute, shall swallow up the base Fee, and be consolidated into one entire Estate; and to prove this, the Cases in the * Margin were cited.

(6.) That

(6.) That this Estate-Tail being extinguished by the Fine, the reversionary Lease is a good and unavoidable Lease, issuing out of the Remainder in Fee, which the Lessor William Martin had at the Time of the Lease made.

(7.) That the Power of Election which the Issue in Tail had of avoiding this Lease, was destroyed by the Fine, because the Estate-Tail being extinguished by it, the Fee-simple was let into Possession.

But in other collateral Matters, Holt Chief Justice differed from the other Judges.

For first the other Judges held, that if William Martin the Father at the Time he made this Lease, had been only Tenant in Tail, without the Remainder in Fee, in such Case the Cognissee should not avoid the Lease, because the Power of avoiding such Charges was annexed to the Estate-Tail, and rests in Possibility thereof, being given to the Issue by the Statute de Donis, and is not transferrable by the Issue to the Cognissee, or to any Stranger; but 'tis as a Power of Revocation which is determined by changing or destroying the Estate to which 'tis annexed.

(2.) That such a future Lease is not become merely void by the Death of the Tenant in Tail, (the Lessor) before the Commencement of the Lease; but that after the Death of the Tenant in Tail, it is voidable only by some Act of the Issue in Tail; and Justice Eyre held, that admitting such Lease was void by the Death of the Lessor *ut supra*, yet the Fine had made it unavoidable by the Cognissee.

But this seems absurd, that a Thing once absolutely void, should be made good by any Matter *ex post facto*.

And Holt Chief Justice held the contrary in both Points, for first he held it clear, that if William Martin the Lessor had been barely Tenant in Tail without any Remainder in Fee, that then the Cognissee or Feoffee of the Issue in Tail might avoid this Lease; for he held, that by the Death of the Tenant in Tail before the future Interest could commence, the same would become void *ipso facto* as to the Lessee, for when the Lessor (Tenant in Tail) dies before the Lease is to begin, 'tis the same in Reason as where Tenant in Tail makes a Lease to begin after his Death, which is admitted to be void *ab initio*.

For upon the Death of Tenant in Tail, the Estate descends to the Issue, and he is in paramount the future Interest; and the Lessee in that Case (before the Commencement of the Lease) hath only a Right or Possibility of an

Estate, which by the Death of the Tenant in Tail (before that Right is to vest as an Estate) is extinct and gone.

1 Inst. 218.
4 Rep. 53.

And he put this Difference between the Circumstances and Ceremonies necessary to the Devesting an Estate out of another, and where 'tis only to vest an Estate which is vacant, and not to divest any other Person; for in the first Case the Law requires, that an Entry be made, or at least a continual Claim where the Entry is perilous, because of the Alteration of the Possession.

But in the last Case the Law doth that Office for the Party, and vests the Estate in him without any Ceremony; so in the principal Case when Tenant in Tail died before the Commencement of the future Lease, the Law vests the Reversion in Tail in the Issue immediately by Descent, and he shall not be put to enter, for then he would be a Trespasser to the Lessee in Possession; and it would be absurd to claim, because the Reversion was only in himself.

Litt. sect. 680.
3 Rep. 84, 85.

And the Chief Justice argued, that if Tenant in Tail of a Reversion granted it in Fee, this would be void by the Death of the Grantor; but that the Issue in Tail might by his own Admittance (as by bringing a Formedon against the Grantee) cause it to have an Existence afterwards.

1 Cro. 302.

And that where a bare Tenant in Tail makes a future Lease, and dies before 'tis to commence, such Lease is merely Void without more Circumstances; but yet that the Issue in Tail had his Election to make it good by accepting the Rent, or by distraining and Abowry, which amounts to an Admittance of the Lease, and so estops and concludes the Issue to deny it.

1 Roll. Rep.
190.

So that the Election of the Issue in that Case is only to support and make good the Lease by some Act of his own Conclusion, and not an Election to avoid it by his own Act, because there is no such Act necessary; for the Law esteems it void ipso facto by the Death of the Tenant in Tail, ut supra, unless the Issue doth by some Act make it good; and so is the Opinion in 1 Inst. 46. and the same cited in * Smith and Stapleton's Case, which the Chief Justice held to be good Law, but the other three Justices doubted.

Litt. sect.
625, 626.
Dyer 12, 54.
1 Inst. 345.

And Holt Chief Justice put these Cases, (viz.) If Tenant for Life, and he in Reversion in Fee join in a Fine or Feoffment to a Stranger, the Estate for Life is merged, so

so likewise where he in Remainder in Tail, joins with the Tenant for Life ut supra; and yet in the last Case the feoffee or Cognisee shall hold, during the Life of the Tenant for Life, tho' the Tenant in Tail be dead without Issue; quod nota.

Nota; Justice Dolben said, that the Case of Opy and Thomasius was misreported by Sid. for he was then at the Bar, and no Judgment was given in that Case.

Carter *versus* Cawthrop. Hill. 3 W. & M.
B. R. Rot. 506.

WRIT of Error on a Judgment in the Court of Hall, in an Action on the Case for stopping the Plaintiff's Lights by erecting a new Structure, and concluded his Declaration thus, (viz.) per quod the Plaintiff lost the Light and Comfort of his Windows from such a Day to the Time of the Plaint levied, and then goes farther, (viz.) Et magna pars prædict' messuagii (of the Plaintiff) occasione præmissorum magna tenebritate obscurat' fuit & adhuc existit unde dicit, &c.

Upon Not guilty pleaded the Plaintiff had a Verdict, and upon a Writ of Error, it was assigned for Error, that the Plaintiff had declared for Damages after the Time of his Plaint levied even to the Time of his Declaring, (viz.) That his House was darkned, & adhuc existit, which ought not to be, for he shall not have Damages for any Matter after the Action commenced, because if another Action should be brought for the same Thing, this former Action cannot be pleaded in Bar to it; and therefore the Jury having given entire Damages in this Case, 'tis naught, for they have given Damages for the adhuc existit darkned, which is Matter subsequent to the Action, and the Case of * Hambleton and Vere was relied on as an Authority in Point.

But it was answered and so resolved per Curiam, that this Case was not like that in Sanders, for the adhuc in this Case shall refer to the Time of the Plaint † levied, and not to the Time of the Declaration.

Wherefore the Judgment was affirmed.

1 Sand. 87, 88. Co. Ent. 11, 12. Dyer 250. Co. Ent. 14, 15. 9 Rep. Batten's Case.
Winch. Ent. 146. Hern 140.

3 Lev. 343.
4 Mod. 152.
Where the Plaintiff declared for Damages after the Commencement of the Action.

See antea
Venables *ver.*
Daffe.

* 2 Sand.
170.

† Co. Ent.
246, 247,
290.
Rast. Ent.
206, 330.

In the arguing this Case, another was cited, between Hext and Barton in C. B. Mich. 1 Jac. 2. Rot. 425. which was an Action for stopping Lights, &c. with an adhuc existit, as here, and it was moved in Arrest of Judgment upon the same Exception of entire Damages; but that Court over-ruled it, and held the Declaration good, and the Plaintiff in that Case had his Judgment.

This last Case is reported in 3 Lev. 246.

Davis *versus* Speed. Hill. 3 W. & M. B. R.
Rot. 261.

4 Mod. 153.
Salk. 675.
Limitation
of the Uses
of a Fine, be-
cause there
was no Dis-
position of
the Freehold
to support
the contin-
gent Uses.

IN a special Verdict in Escamēt, the Case was thus:
H. Husband and Wife leased in Fee in the Right of his Wife, joined in a Fine with Proclamations, &c. and by Deed declared the Uses, (viz.) That the Cognisees should stand leased to the Use of the Heirs of the Body of the Husband, begotten on the Body of the Wife, and for Want of such Issue, to the right Heirs of the Husband; they had Issue between them, but died in the Life-Time of the Husband and Wife; then she died, and afterwards her Husband died without Issue, and the Lessor of the Plaintiff was Heir at Law to the Husband, and the Defendant was Heir at Law to the Wife.

The Question was, Whether this Limitation of the Uses of this Fine was void in Law, because there was no Disposal of the Freehold in presenti to support the contingent Uses.

And in Easter-Term, Anno 5 W. & M. it was adjudged by the whole Court for the Defendant; for they held the Limitation supra to be void for Want of a particular Estate, and present Disposition of the Freehold, as a Foundation to support the contingent Uses; for otherwise the whole Inheritance must be in Abeyance, which cannot be; and to prove this Matter the Cases in the * Margin were cited.

* 1 And. 328.
4 Leon. 293.
3 Cro. 334.
Moor 349.
Mod. Rep.
121, 159.

And Holt Chief Justice arguendo put these Cases, (viz.) If a Feoffment in Fee is made to the Use of A. and the Heirs of his Body begotten, the Remainder in Fee to the right Heirs of T. S. who is then living, that in such Case the Fee-simple is not in Abeyance, nor in the Feoffee; but the

the Use of the Fee shall result to the Feoffor, and remain in him until the Contingency, (viz.) the Death of T. S. shall happen.

(2.) If T. S. covenants to stand seised to the Use of the Heirs of his own Body begotten after the Death of E. G. this is a good Limitation of a springing Use in Tail, and the old Estate remains in the Covenantor until the Contingency happens; and this was the Opinion of the Ch. Justice Hale.

The King *versus* Marriott.

THE Defendant was indicted at the Sessions for Keeping an Ale-house without License, and being convicted of the Offence, it was moved in Arrest of Judgment, that an Indictment will not lie in this Case, because 'tis no Offence at Common Law, but is made so by particular * Statutes, which prescribe express and particular Punishments, by Imprisonment and Forfeitures, and therefore the Offender is not to be punished in any other Manner than ordained by the † Statute which creates the Offence.

4 Mod. 144.
Indictment
lies for
Keeping an
Ale-house
without Li-
cense.
* 5 & 6 Ed. 6.
cap. 23.
3 Car. 1.
cap. 3.
† 2 Cro. 643,
644, 647, 648.
Palm. 388.

7 Rep. 36. Godb. 341. 2 Roll. Abr. 84, 247, 398. 1 Mod. 34. 1 Saund. 249.

See in 4 Mod. this Indictment was quashed for the Reason supra, but it was against the Opinion of Holt Ch. Just. because an Indictment being a summary Way of Proceeding, is more beneficial for the Subject.

'Tis prohibited by the Statute 22 Car. 2. to travel with more than five Horses at Length; this is a new Law and a new Offence; yet an Indictment will lie against the Offender, tho' a particular Punishment is directed by that Statute.

Wharton *versus* Lisle. Hill. 3 Will. & Mar. B. R. Rot. 36.

IN Trover for 20 Cart-Loads of Flax, a special Verdict was found at the Assizes in Essex, (viz.) That the Plaintiff was Impropriator of the Parish-Church of Thorp in that County, and that the Defendant was Vicar of the same Church, and that the Impropriators used to have Omnes decimas

3 Lev. 365.
4 Mod. 183.
Tithes of
Flax belong
to the Vicar,
as being
small Tithes.

cimas magnas cujuscunq; generis vel speciei, coming of all the Lands of the same Parish, and that there are 520 Acres of arable Land, 720 Acres of Pasture, and 60 Acres of Meadow, in the said Parish; and that 26 Acres of the arable Land had, for eight Years last past, been sown with Flax, and that no Flax had at any Time before the said eight Years, been sown in the said Parish, and that the Flax in the Declaration, &c. was the tenth Part severed and set out for Tithes of the said 26 Acres of Flax; and they conclude, that if the said Tithes Flax are Magnæ Decimæ, then they find for the Plaintiff; but if they were Minutæ Decimæ, then for the Defendant.

And by the Opinion of three Judges, the Tithes of this Flax are small Tithes, and belong to the Vicar; and Justice Gregory cited a Case ruled in the Exchequer when he was a Baron, concerning Clover-Grass, that the Tithes of it belonged to the Vicar, who had the Tithes-Hay, except only such Clover as was necessarily cut amongst the Corn where it did grow.

Sed per Holt Ch. Justice, These are not small Tithes, for Decimæ sunt minutæ with Respect only to the Quantity, and not to the Quality of the Thing; but Judgment was given for the Defendant by the Opinion of the other three Judges.

Dupratt *versus* Testard.

Special Bail shall not be put in by an Executor upon a Suggestion of a Devastavit; otherwise if the Sheriff return a Devastavit.

Judgment against the Defendant, as Executor of T. S. whereupon the Plaintiff brought an Action of Debt in the Debet & Detinet, suggesting a Devastavit by the Defendant.

The Question was, If the Defendant should be held to special Bail; and the Court took this Difference, (viz.) That where upon such Judgment Execution is taken out, and the Sheriff hath returned a Devastavit, in such Case the Defendant, upon an Action of Debt, ut supra, shall put in special Bail, because of the Sheriff's Return, but not upon a bare Suggestion of a Devastavit, for there the common Bail shall serve.

Howard *versus* Tremaine.

AT a Trial in Ejectment at the Assises in Exon, one Langford (who was the Lessor of the Plaintiff) amongst other Things, offered to give in Evidence some Depositions of Persons then dead, and taken *de bene esse*, upon a Bill in Chancery brought by the said Langford against Tremaine, to perpetuate the Testimony, &c. and the Defendant Tremaine had not put in his Answer, neither had the Plaintiff taken out any Process of Contempt to compel him to answer, according to the Practice and Course of the Court, and altho' the Bill had been filed a Year and more.

4 Mod. 146.
1 Salk. 278.
Depositions taken *de bene esse* upon a Bill to perpetuate the Testimony of Witnesses where there was no Answer put in, may be read in Evidence.

And a Case being made of all this Matter, and referred to the Court of B. R. whether these Depositions taken *de bene esse* upon a Bill, to which there was no Answer, and by Consequence no Issue joined, should be admitted to be read as Evidence, or not; and after much Debate the Court was of Opinion, that these Depositions might be given in Evidence; otherwise a Bill in Equity to perpetuate the Testimony of Witnesses, would be to very little or no Purpose.

Hardres 319,
332, contra.
Raym. 339,
336.

Broddeck *versus* Briggs the Marshal.

EScape against the Marshal, who pleaded, that the Defendant was an Alien Enemy, born beyond Sea, at such a Place in France.

Immaterial Traverse is but Matter of Form.

The Plaintiff replied, that he is a Denizen born in England, and traversed, that he is an Alien born *modo & forma*, &c.

And upon a general Demurrer to this Replication, it was held by the Court, that the Traverse was ill, because no Venue can arise from a Place beyond Sea; therefore the Plaintiff ought to have relied upon the first Part of his Replication, (*viz.*) That he is a Denizen, and then a Place of Trial might be laid here, &c.

But the Defendant having demurred generally, no Advantage can be now taken of this immaterial Traverse; which is but Matter of Form; and if the Defendant had taken Issue upon the Plaintiff's being a Denizen, as he might,

M m

See Nicholls
v. Pawlett
postea.

might, it should be tried where the Action is laid, because
tis but a transitory Matter.

The Plaintiff had Judgment.

Lamb *versus* Archer. Hill. 3 Will. & Mar.
B. R. Rot. 828.

1 Salk. 225.
Limitation
of a Term
by Way of
executory
Devise.

In a special Verdict in Ejectment, the Case was thus:
J. John Bull being possessed of the Lands in Que-
stion for the Term of 3000 Years; and having demised
Parcel thereof to his Son Richard for a less Term, and
other Parcel, to Luke Sutton, in like Manner, did by his
Last Will devise in these Words:

Item, Whereas Richard Bull, my Son, hath an Estate in
the Living where he now lives, in *Hunton*, for 99 Years,
if the said Richard and Mary his Wife so long live; my
Will and Meaning is, that he the said Richard shall have
and enjoy all that the aforesaid Living, with the Appurte-
nances, and also all that Part of the Living, with the Ap-
purtenances, after the Widowhood of Elizabeth my Wife,
which I now live in, during the Remainder of the Years
which I have to come and unexpired, which Luke Sutton
did formerly Rent, to him and the Heirs Males of his Bo-
dy begotten, and to be begotten; and for Want of such
Issue, then my Son John, and his Heirs Males for ever.

The said Richard paying and discharging all such Lega-
cies as hereafter shall be given by me; and if the said
Richard shall happen to die before his said Mother, with-
out any Issue, as aforesaid, I do then give and bequeath
unto my Son John, and his Heirs Males, as aforesaid, after
the Expiration of the aforesaid Lease made unto my Son
Richard, and Mary his Wife, the aforesaid Living, which
Richard my Son liveth in, as also the other Living which
Luke Sutton did formerly rent, after the Widowhood of
my now Wife, he the said John paying and discharging all
such Legacies and Payments, as the said Richard is and was
to pay in Case he had lived.

The Jury found, that Richard Bull died without Issue
Male, living his Mother; and that Mary his Wife was like-
wise dead, that Archer the Defendant married Mary, the
Daughter of the said Richard Bull, who in his Life-time
had granted the whole Term to the said Archer, and his
Wife; and that John Bull, the Son of the Testator, was
Lessee of the Plaintiff.

The single Question upon this Verdict was, Whether the Limitation of the Term to John Bull upon the Contingency of Richard dying without Issue Male living his Mother, was a good Limitation in Law.

And upon the first Argument it was resolved by the whole Court without any Difficulty, that it was a good Limitation by way of Executory devise to John, and did not tend to a Perpetuity, as it was suggested.

It was also held, that the first Limitation to John upon the Death of Richard without Issue Male generally, was a void Limitation, because it tended to a Perpetuity, but upon the last Clause Judgment was given for the Plaintiff.

And the Case of * Child and Baily which is reported in several Books was denied to be Law, but that the established Law in Cases of this Nature, is according to the Resolution in the Duke of Norfolk's Case.

* 2 Cro. 459.
2 Roll. Rep.
129.
Palm. 48,
333.
W. Jones 15.

D E

Term. Paschæ.

5 Will. & Mariæ B. R.

Hall *versus* Cupper. Pasch. 5 W. & M. B. R.
Rot. 292.

Demand *ore
tenus* need
not be made
to the Per-
son, nor at
the last Hour
of the Day.

THE Plaintiff sold to the Defendant a Share of five hundred Pounds in the East-India Stock, and the Defendant covenanted to transfer the said Share unto the Plaintiff, provided that he (the Plaintiff) did upon such a Day by Word, or by Writing, left at the East-India House in Leadenhall-Street, demand the said Stock to be transferred unto him.

In an Action of Covenant brought by the Plaintiff, the Breach assigned was, that upon the Day, &c. he (the Plaintiff) demanded to have the said Share of five hundred Pounds to be transferred to him, scil't, at the East-India House in Leadenhall-Street, secundum formam scripti, and that he was then and there ready, and offered to pay the Price agreed on, &c. if the Defendant would have transferred, &c. but the Defendant adtunc & ibidem penitus inde defecit ac ill transferre seu transferri causare omnino recusavit contra formam, &c.

(1.) And upon a Demurrer to this Declaration it was objected, that this Demand of the Transfer being made ore tenus, and not by Writing, it ought to be made to the very Person of the Defendant; for that the Words (at the East-India House) have Respect only to the Demand which was to be made in Writing, and not to the Demand ore tenus; but here the Plaintiff hath alledged a Demand by Word at the East-India House, and not of the Person of the Defendant.

(2.) The next Objection was, That this Demand is not laid to be made at the last Hour of the Day, as is usual in Cases of Pleading a Demand for Rent.

Sed per Curiam, it was answered and resolved, that the Words (at the East-India House) have a Respect as well to the Demand ore tenus, as to a Demand in Writing; and 'tis the Usage amongst Merchants to make all their Demands ore tenus upon such Bargains, as well as sometimes by Writing at the East-India House, and not to seek after the Person of the Vendor.

And as to the second Objection they held, that the Demand was well laid as to the Time, for a Day and Place certain were appointed, and the Plaintiff hath laid it upon the same Day; and farther alledged, that the Defendant transerre recusavit, which is sufficient.

Judgment for the Plaintiff.

Williams *versus* Williams. Pasch. 5 W. & M.
B. R. Rot. 170, 171, 172.

THE Plaintiff Thomas Williams being a Goldsmith in Lombard-Street, brought an Action on the Case against Joseph Williams the Proprietor of the diving Engine, and declared upon a Note drawn by one John Pullin, by which he promised to pay 12l. 10s. unto the said Joseph Williams on a Day certain; and he endorsed the Note for Value received unto one Daniel Foe, who endorsed it to the Plaintiff for like Value received.

And now the Plaintiff as second Endorsee, declared in this Manner, *scilicet* That the City of London is an ancient City, Quodq; habetur & a tempore cujus contrarium memoria hominum non existit habebatur quædam antiqua & laudabilis consuetudo inter mercatores & al' personas com-

Custom of Merchants concerning Bills of Exchange is Part of the Common Law.

2 Vent. 293.
This Way of declaring held good.

commercium exercen' infra hoc regnum Angliæ residen' usitat' & approbat', videl't, &c.

So sets forth the Custom of Merchants concerning Notes so drawn and endorsed ut supra, by which the first Endorser is made liable as well as the second, upon Failure of the Drawer, and then sets forth the Fact thus :

¶ Cumque etiam quidam Joh'es Pullin existen' persona quæ per viam Merchandisand' commercium habuit, &c. (on such a Day) apud London' prædict', videl't, in parochia beatae Mariæ de Arcubus in Warda de Cheap' secundum usum & consuetud' mercatorum quandam Billam sive notam in scriptis nomine suo subscript' fecit geren' dat', &c. Et per eandem Billam sive notam promisit solvere, &c. setting forth the Note ; and farther that it was endorsed by the Defendant to Foe, and by Foe to the Plaintiff, secundum usum & consuetudin' mercatorum ; and that the Drawer having Notice thereof, refused to pay the Money, per quod the Defendant, secundum usum & consuetud' mercatorum, became liable to the Plaintiff, and in Consideration thereof promised to pay it, &c. alledging that they were all Persons who traded by way of Merchandise, &c.

To this the Defendant pleaded a frivolous Plea, and the Plaintiff demurred, and upon the first Opening the Matter had Judgment in B. R. and now the Defendant brought a Writ of Error in the Exchequer Chamber, and the only Error insisted on was, That the Plaintiff had not declared on the Custom of Merchants in London, or any other particular Place, (as the usual Way is) but had declared on a Custom thro' all England, and if so, 'tis the Common Law, and then it ought not to be set out by way of Custom ; and if 'tis a Custom, then it ought to be laid in some particular Place from whence a* Venue might arise to try it.

* 9 Rep. 75. b.
11 Rep. 85. b.
Dyer 54. a.
2 Leon. 114.
1 Inst. 110.
Hardr. 485.
2 Vent. 310.
adjudged good.

† 3 Mod. 226.
See Megado-
ra and Holt,
and Lidlow,
and Boynton.

Surplusage.

To which it was answered, that this Custom of Merchants concerning Bills of Exchange is Part of the Common Law, of which the Judges will take Notice ex officio, as it was resolved in the Case of † Carter and Dowrish ; and therefore 'tis needless to set forth the Custom specially in the Declaration, for 'tis sufficient to say that such a Person secundum usum & consuetudinem mercatorum drew the Bill ; therefore all the Matter in the Declaration concerning the special Custom was merely Surplusage, and the Declaration good without it.

The Judgment was affirmed.

Hinks

Hinks *versus* Harris.

Prohibition, &c. the Case was, Hinks and Elizabeth his Wife were prosecuted in the Court-Christian for an incestuous Marriage, for that the said Elizabeth was Sister to the first Wife of Hinks.

Elizabeth died pending the Suit, whereupon the surviving Husband pleaded in Abatement the Death of his Wife; but that Court rejected the Plea, and afterwards gave Sentence, that the Marriage was incestuous, void and null.

And it was now moved, that the Wife being dead, the Spiritual Court ought not to have proceeded to annul the Marriage, for that Hinks and his Wife had Issue between them now living, and by that Means the Issue would be made Bastards after the Death of the Parent, which is contrary to the Rules of Law laid down in * Kenn's Case.

And after Debate, a Prohibition was granted, quoad the Annulling the Marriage only, but that the Spiritual Court might proceed against Hinks after the Death of his pro salute animæ, to punish him for the Incest, but they should not make the Marriage void, so as to bastardise the Issue, for that was against Law; and the Authority in Kenn's Case was the Rule in this Case.

4 Mod. 183.
2 Salk. 548.
Libel in the Spiritual Court against Husband and Wife for an incestuous Marriage, and pending the Suit the Wife died, which the Husband pleaded in Abatement; but that Court proceeded to make the Marriage void: A Prohibition was granted.

* 7 Rep. Casu ultimo.

Knight *versus* Keech. Trin. 3 Will. Rot. 364.
in C. B. Mich. 4 Will. & Mar. B. R. Rot. 60.

THIS was a Writ of Error on a Judgment in C. B. wherein the Plaintiff declared upon a Special Agreement, (viz.) That whereas Knight was possessed of a Mole-ty of such a Ship, then in a Voyage, and had such a Share of the Profits of the said Voyage; it was agreed between him and Keech, that he (Knight) should sell and convey to the said Keech, all his Interest in the said Ship, and Profits of the said Voyage, and that the Sale should be in Writing, and that Keech should pay unto Knight 600 l. for the same, viz. 23 l. in Hand, and the Residue at the Execution of the Writing; and then lays a reciprocal Promise, that Knight, in Consideration that Keech had paid 23 l. in Hand, and had promised to perform the said Agree-
ment

4 Mod. 188.
S. C.

3 Lev. 319.
S. C.

Where the not assigning a particular Breach of a Promise is cured by a Verdict.

He should
have set
forth some
particular
Instance of
the Breach of
this Agree-
ment.

ment in all Things on his Part, he promised to perform the said Agreement in all Things on his Part, and then lays the general Breach, (viz.) That Knight agreementum suum prædict. hucusq; aliquantulum non performavit, tho' on such a Day, &c. he was specially requested so to do, &c.

Upon Non Assumpsit pleaded the Plaintiff had a Verdict and 73 l. Damages; and now upon a Writ of Error brought, it was insisted, that this Breach of the Agreement in these Words, (viz.) Agreementum suum hucusq; aliquantulum non performavit, was too general and incertain, for he ought to have set forth some particular Instance of the Breach of the Agreement.

'Tis true, the Promise is general, but yet the Breach thereof must be particularly shewn, to entitle the Plaintiff to his Action, and to give the Defendant an Opportunity of making and applying his Defence.

* 3 H. 6. 8.
9 H. 6. 16.
Dyer 297.
Yelv. 40.
1 Sid. 173.
270. 447.
1 Saund. 330.

Sed per Curiam, This might be good Matter upon a Demurrer, but that the Plaintiff in the original Action was helped by the * Verdict, for it shall be intended, that some particular Breach was given in Evidence to the Jury; otherwise the Plaintiff could not have recovered a Verdict.

Tippin *versus* Cosin. Hill. 5 Will. & Mar.
B. R. Rot.

4 Mod. 380.
Contingent
Remainder
which the
Heir shall
take by Pur-
chase and
not by De-
scend.

IN a special Verdict in Ejectment, the Jury found as fol-
loweth:

That Edward Cosin was seised in Fee of the Lands in Question, which by Deed and Fine he settled on his own Marriage, (viz.) To the Use of himself and his Heirs, until the Marriage should take Effect, and afterwards to the Use of the Wife for Life, and after her Death, then to the Use of the Cognisees in the said Fine, and their Heirs, during the Life of the said Edward Cosin, upon Trust, to permit and suffer him to take the Profits, &c. and afterwards to the first and every Son of that Marriage in Tail Male; and for Want of such Issue, to the Heirs of the Body of the said Edward Cosin; and for Want of such Issue, to the said Edward Cosin and his Heirs for ever.

The Marriage took Effect, and they had Issue only one Daughter, since married to George Tippin, who likewise had Issue by his said Wife one Daughter, an Infant, and Lessee of the Plaintiff.

Edward Cofin, the Father, upon some Displeasure at the said Marriage, levied another Fine with Proclamations and Warranty to the Use of the Defendant Cofin, and his Heirs for ever.

The Wife of Tippin died, then her Father, Edward Cofin, died without any other Issue; and his Widow entered and enjoyed the Lands during her Life, and died.

The Question was, Whether the Daughter of George Tippin, who was certainly the right Heir of Edward Cofin, her Grandfather, was barred by the last Fine, with Proclamations; and that Question did arise upon the Limitation of the Uses, &c. (viz.) If thereby Edward Cofin took an Estate-tail vested in himself, or whether the Remainder limited to the Heirs Males of his Body was a contingent Remainder, which his Heir shall take as a Purchaser, and not by Descent.

For if his Heir shall take by Purchase, then the last Fine levied by Edward Cofin shall be no Bar to the Heir, because he doth not claim under the Cognisor of the said Fine, but under the Marriage Settlement supra.

And it was argued for the Plaintiff (the Heir at Law) that this Case differs from that of * Fenwick and Mirford, for there no Use at all was limited for the Life of the Feoffor; so that there was a Vacancy which the Law would not supply by Implication.

* 1 Inst. 23. b.
Moor 284.
1 Leon. 182.

But in the principal Case there is an express Estate limited to the Cognisees, during the Life of Edward Cofin, so there is no Room left for any Implication; besides, in Mirford's Case it was held to be no other than the old Reversion subsisting in the Feoffor; but the Limitation here is of a new Estate, (viz.) An Estate-tail, and therefore cannot be any Part of the old Estate, which was a Fee-simple.

On the other Side it was argued against the Heir, that the Limitation of the Profits to Edward Cofin, during his Life, was a Remainder vested in him by the Statute of Uses.

Verba for
the Defen-
dant.

Sed per Curiam, that was denied, for then there would be an Use upon an Use.

Then it was farther argued, that the Law would imply an Estate for Life in Edward Cofin, intermediate between the Estate of the Cognisors and that to the first Son of that Marriage, because it was possible that they (the Cognisees) might forfeit or surrender.

N n

And

And moreover, that there might be a Transposition of the Name (Edward Cosin) which precedes the last Remainder in Fee, and to place it immediately before the Limitation to the Heirs Males of his Body, and then he would have an Estate-tail in Remainder vested in him.

There was another Point stirred, (viz.) The Descent of the Warranty upon the Heir at Law, but he being an Infant, that was waived on both Sides.

And upon the first Argument, the whole Court was clear in Opinion, that this was a contingent Remainder, and such as the Heir should take by Purchase, and not by Descent, and that this Case differs from that of Fenwick and Mirford, for the Reasons *supra*.

And Judgment was given for the Plaintiff.

Prigg versus Adams.

^a Salk. 674.
Where a
Judgment is
not *ipso facto*
void, tho'
declared by
a private Act
of Parlia-
ment, that it
shall be void.

IN an Action of False Imprisonment, the Defendant pleaded a Judgment in the Town-Court in Bristol, obtained against Prigg, and that he was arrested and imprisoned by Virtue of an Execution thereon, &c.

The Plaintiff replied, and set forth a private Act of Parliament lately made, by which a Court of Conscience was erected in that City, to have the sole Conscience in the several Actions therein expressed, concerning all Matters under 40 s. to be brought against any poor Inhabitant of that City, and that all Judgments elsewhere for such Matters should be meerly void.

Then he sets forth, that he is a poor Inhabitant of the said City, and that the Matter for which the Judgment was obtained was under 40 s. and that the Action was within the said Statute.

There was a frivolous Resolinder to this Replication, and thereupon a Demurrer; and the Questions were,

(1.) Whether this Judgment against Prigg was by Force of this Act of Parliament *ipso facto* void, or whether it is voidable by Writ of Error, or by Plea.

(2.) Whether Prigg hath now lost the Benefit of the said Act by not Pleading it in the original Action to the Jurisdiction of the Court; and setting forth, that he was a poor Inhabitant of that City, so as to entitle him to the Benefit of that Act.

(3.) What

(3.) What Remedy, if any now remained to Prigg, (after Judgment) to avoid the same.

And after Argument it was resolved by the Court,

That this Judgment was not ipso facto void, so as to make the Plaintiff in the original Action, and the Officers (who served the Execution) Trespassers; and that the regular Way to take the Benefit of the Act was for the Defendant below to have pleaded this Matter, and so to have entitled himself to such Benefit.

Where a private Act of Parliament should be pleaded.

That since the Judgment was not absolutely Void, and tho' Prigg had neglected to plead the Statute to the Jurisdiction of the Court below, yet he was not without Remedy.

For he may come in upon the Return of the Ca. sa. in Custody below, and then plead this Statute with the necessary Verments in Discharge of the Execution.

As upon the Statute of * Additions which hath the same Words, (viz.) That the Outlawry shall be void if there is no Addition; and yet in that Case it hath been always held, that the Person so outlawed must either reverse it, or plead it off ut supra, and † Turner's Case was cited and allowed for Law; for an irregular Judgment is no Judgment, and that was vacated before the Action brought, so that the Plaintiff might have replied nul tiel Record to the Defendant's Pleading the Judgment.

* 1 H. 5. c. 3.

† Turner
ver. Pelgate.
2 Sid. 125.
Raym. 73.
74

Judgment for the Defendant, quod quer' nil capiat, &c.

Benson *versus* Scott. Hill. 4 W. & M. B. R.
Rot. 566.

IN a special Verdict in Ejectment, the Case was as followeth:

3 Lev. 385.
1 Salk. 158.

A Copyholder in Fee, where by the Tenure the Widow was entitled to her Free-Bench, surrendered his Copyhold into the Hands of two Tenants according to the Custom to the Use of T. S. and his Heirs.

Where the Widow was defeated of her Free-Bench in a Copyhold.

This Surrender was presented at the next Court, but after, and before the second Court the Surrenderor died, and at the next Court after his Death, the said T. S. and the Widow were admitted.

And the Question was, If the Widow was defeated of her Free-Bench by the Admittance of the Surrendree, or whether the Widow's Estate being attached by her Husband's dying seised, should suspend the Operation of the subsequent

Admittance of the Surrendree until after the Marriage, or the Death of the Widow.

1 Inst. 59. A.
3 Bulst. 219.
2 Cro. 100.
Cro. Car.
410.

And upon the first Argument it was adjudged without Difficulty, for the Surrendree against the Widow; for tho' by the bare Surrender, no Estate passeth out of the Surrenderee, and by Consequence he died seised in Fee of the Copyhold; yet it was not of an absolute, but a defeasible Estate of Inheritance, subject to be destroyed by the subsequent Admittance of the Surrendree; and therefore the Widow's Estate which is derived out of that Estate of which her Husband died seised, must necessarily partake of the same Quality, and remain defeasible in her, as it was in her Husband.

And the Admittance of the Surrendree shall have Relation to the Time of the Surrender made, as well to defeat all mean Acts made by the Surrenderee, as all other customary Estates derived out of his Estate; for 'tis very clear, that her Title by the Custom doth not commence by the Marriage, (as it doth in Dower at Common Law) for if he did, then the Husband could not defeat it by any Act, which he may in Case of Free Bench, for there the Husband must die seised, otherwise the Widow hath no Title.

So Judgment was given for the Plaintiff, the Lessee of the Surrendree.

Hibbert *versus* Courthope. Hill. 4 W. & M.
B. R. Rot. 231.

In *assumpsit* for Work and Labour, the Plaintiff need not set forth what Manner of Work or Labour.

Assumpsit, &c. and Judgment against the Defendant by Default, and now upon a Writ of Error brought, the Error insisted on was, that the Declaration was general, (*viz*) That the Defendant was indebted to the Plaintiff in so much Money pro opere & labore ipsius (the Plaintiff) pro prædicto (the Defendant) ad special' instantiam & requisitionem prædict' (the Defendant) ante tempus illud fact' & performat', without setting forth what Sort of Manner of Work or Labour it was, so that it might appear to the Court to be lawful; for it might be about some unlawful Matter, for which the Law will not imply any Promise, &c.

Sed non allocatur, for per Curiam, the only Reason why the Plaintiff is bound to shew wherein the Defendant is indebted, is, that it may appear to the Court that 'tis not a Debt on Record or Specialty, but only upon simple Contract; and any general Words, by which that may be made to appear, are sufficient.

The Judgment was affirmed.

An-

Andrews *versus* Whittingham. Trin. 4 W. & M.
B. R. Rot. 815.

IN Ejectment in the County Palatine of Durham, the Plaintiff declared upon a Demise de mineris carbonum in parochia de D. &c. generally, not saying how many Mines, &c.

4 Mod. 143.
1 Salk. 255.
Ejectment de
mineris Car-
bonum, good.

Upon Not guilty pleaded, the Plaintiff had a Verdict, and Judgment, and upon a Writ of Error brought, the Error assigned was in the Declaration, because of the Uncertainty thereof, for not setting forth the Number of Coal-Mines, so as the Sheriff might know of how many to give Possession.

And for this Reason the Court inclined, that the Judgment was erroneous; but then the Plaintiff producing several Precedents in Durham, and alledging that all the Entries there in Ejectments for Coal-Mines were the same as in this Case, the Judgment was affirmed.

The King *versus* Gallwich. Pasch. 5 W. & M.
B. R.

THE Defendant was indicted in Middlesex, for being a Pawn-broker, and it was moved to quash it, for that this Indictment was in Nature of an Action of Trover, for it was, that the Defendant on such a Day, &c. had lent Mary the Wife of T. S. 2 s. 6 d. and at the same Time did receive of her an Under-Petticoat of Silk as a Pawn for the Repayment of the Money, and that he (the Defendant) had illicit & deceptive refused to deliver the said Petticoat, notwithstanding that the said Mary had tendered to him the said 2 s. 6 d. with Interest for the same, ad damnum of the said T. S. & in malum exemplum, &c. so that at most this is only a Breach of Contract, which is actionable, but not indictable.

Indictment
in Nature of
an Action of
Trover a-
gainst a
Pawn-bro-
ker.

But the Court would not quash the Indictment (absente Holt Chief Justice,) because of the Abuse by Pawn-brokers.

Sed quare, for if the Defendant had demurred to this Indictment, it could not have been maintained by Law.

D E

Term. Sanct. Trin.

5 Willi. & Mariæ, B. R.

Loyd versus Ogle, and Loyd versus Eagle.

An Infant
being Bail,
and taken in
Execution,
'tis discreti-
onary to dis-
charge him
on Bail, or
not.

In an Action
of Assault,
the Process
was marked
for special
Bail.

AN Action of Assault and Battery was brought by Loyd against Ogle, and the Battery being outrageous, the Plaintiff procured the Process to be marked for special Bail.

Whereupon Ogle was arrested, and Eagle entered into a Recognisance before a Judge as Bail in the original Action, and afterwards Loyd the Plaintiff recovered 100 l. Damages against Ogle for the Battery, and had Judgment; and after the Return of the Ca. fa. against the Principal, he sued out a Sci. fa. against Eagle the Bail, and had Judgment thereon, and then Eagle was taken in Execution for the Damages.

Whereupon he brought an Audita querela suggesting his Infancy, and the Writ being brought into Court, he appeared in propria persona, and it was moved, that he might be inspected, and his Witnesses examined; and thereupon his Mother peremptorily deposed, that at that very Time he was 20 Years old and no more, and a Paid Servant gave circumstantial Evidence to the same Purpose, and hereupon it was moved, that he might be bailed.

I

But

But per Curiam, 'Tis Matter of Discretion, either to admit him to Bail, or to refuse it, he being in Execution; but if he had brought this * Audita querela before he had been taken in Execution, he must have a Superseas of Course.

* 1 Roll.
Abr. 383;
2 Roll. Abr.
113.

The Court would not bail him, tho' the long Vacation was near, but required the Evidence to be strengthened by a Copy of the Register where he was born, which being in Yorkshire, he appeared again in Michaelmas Term in Custody, and a Copy of the Register was produced, and sworn to be a true Copy; and the Mother and the Child being again sworn, ut supra, and all agreeing in the same Thing, Eagle was then discharged by the Court.

Co. Ent. 87. b.
88. a.

*The Inhabitants of Shermanbury in Suffex versus
Bolney Parishioners.*

THE Case, (viz.) A poor Man who was lawfully settled in the Parish of Bolney, married a Widow, who was an Inhabitant of the Parish of Shermanbury, who at that Time had three Children (living) by her first Husband, all under the Age of seven Years, and maintained by the Parish of Shermanbury, at the weekly Allowance of 3 s.

A Widow having three Children married an Inhabitant of another Parish, the Children shall not follow the Mother, unless they were Nurse-Children.

After this Marriage, the Mother and her three Children were sent to the Parish of Bolney, where her Husband was settled.

Hereupon the Justices, upon the Complaint of the Parish-Officers of Bolney, made an Order, that the Parishioners of Shermanbury should continue to pay the 3 s. per Week towards the Maintenance of the Children; which Order was confirmed upon an Appeal.

And being removed into B. R. by Certiorari, it was now moved to quash it, because the Justices had no Power to make an Order for such Payment towards the Maintenance of the Children now they dwelt in another Parish.

Sed per Curiam, The Marriage of the Mother into the Parish of Bolney shall not settle the Children there, unless they were Nurse-Children, for such must go with the Mother; but it was doubted, whether these Children, being under 7 Years old, shall be reputed to be Nurse-Children.

Then it was objected, that it did not appear in this Case but that the Father in Law was of sufficient Ability to maintain these Children.

To

To which it was answered by Justice G. Eyre, that where the Relations are obliged to maintain their poor Friends, such poor People shall not be removed out of their own Parish where they are settled, unto that Parish where their Relations live; for by that Means, upon the Death of such Relations, the Parish where they lived may become chargeable, which ought not to be, and therefore the poor Person shall continue in his own Parish, and his Relations shall maintain him there.

Et per Curiam, This Case is within the Equity of the Statute for the Relief of the Poor; and there is no Reason that Shermanbury should be discharged of the Children by their Mother's Marriage.

King & Ux' *versus* Phippard. Trin. 5 Will. & Mar. B. R. Rot. 383.

In an Action of Assault and Battery, where the Pleadings are good without a Traverse.

In an Action of Assault and Battery brought by Husband and Wife for an Assault, &c. on his Wife.

The Defendant pleaded, that the Plaintiff Mary, die & anno supradicto apud H. prædict. in ipsum (the Defendant) in ultum fecit & ipsum adtunc & ibidem verberavit & vulneravit ac ipsum vulnerare & mahemiare voluisset, and so justifies in his own Defence, &c.

The Plaintiff replied, quod prædicto tempore quo, &c. the aforesaid Assault by the said Mary, upon the Defendant, was supposed, the Plaintiff King was possessed of an House situate in, &c. and that the Defendant eodem tempore quo the Assault by the said Mary, upon the Defendant, is supposed, entered into the said House upon the Possession of the Plaintiff King, & ipsum diversis injuriis & contumeliis laceravit super quo (the Plaintiff King) required the Defendant to depart out of his House, but he refused so to do, and thereupon the Plaintiff Mary, per Mandatum of her Husband (the Plaintiff King) molliter manus imposuit on the Defendant, to put him out of the House, super quo the Defendant ira motus assaulted and beat the Plaintiff Mary, as in the Declaration, & hoc parat. sunt verificare.

And upon a Demurrer to this Replication, it was insisted for the Defendant, that the Replication was ill for Want of a Traverse, (viz.) Absq; hoc, that the Plaintiff Mary verberavit & vulneravit the Defendant, because that is positively alledged in his Plea, or at least should have

traversed

traversed ab'q; hoc quod insultum fecit ad vulnerandum the Defendant, as is done in the like Pleading in the Books of Entries, or if they did not traverse, ut supra, it was necessary, at least, that in the Conclusion of the Replication, the Plaintiffs should have averred that to be the same Assault, which the Defendant had mentioned in his Plea.

Rast. Ent.
612. a.
Old. Ent.
155.

Sed per Curiam, The Replication is good and as it ought to be, and that the Traverses, ut supra, had been immaterial, because the Matter of the Plea was confessed and avoided; and the Words verberavit & vulneravit in the Plea doth not differ it from the common Bat Son assault Demesne, but only makes the Plea informal; and as to the Averment, there is no Need of it in this Case, because the Matter of the Replication is laid to be done at the same Time and Place; and 'tis a Rule, that if a Justification be at the same Time and Place, 'tis needless to aver that 'tis the same Trespass.

Where a
Justification
is at the same
Time and
Place, 'tis
not necessary
to aver it to
be the same
Trespass.
21 H. 7. 39.
Savill 45.
2 Saund. 5.

Et per Curiam, The Replication ought to be special, (as 'tis) because this Matter could not be given in Evidence upon the general Replication de injuria sua propria.

Judgment for the Plaintiff.

Gale versus Till.

TILL brought an Action on the Case in the Common Pleas against Gale, as Administrator of T. S. and there was a Verdict and Judgment against him; thereupon he brought a Writ of Error in B. R. and there the Judgment was affirmed; and now it was moved, that the Administrator might pay Costs upon this Writ of Error, because it was his own Act, and lay in his own Knowledge, and was brought in dilacione Executionis, in which Case the * Statute gives double Costs.

4 Mod. 242.
3 Lev. 375.
Judgment against an Administrator was affirmed on a Writ of Error; he shall not pay Costs.
Sid. 183.

* 13 Car. 2.
cap. 2.

But after an Adjournment on Monday 27 Novemb. 1693. it was resolved, that the Administrator should not pay any Costs, for that he was not a Person within the Intent of the said Statute.

Lawrence *versus* Atherton.

Foreign At-
tachment
pleaded ill.

DEBT upon Bond, &c. the Defendant pleaded the Custom of Foreign Attachments in London, (viz.) That on such a Day T. S. entered a Plaint, &c. against the Plaintiff Lawrence in London; and upon Process against him Non est inventus was returned, and thereupon a Suggestion was made, that he had so much Money in the Hands of the Defendant Atherton, and that he the said Atherton was attached by the said Money, and so shews all the Proceedings thereon.

Raft. Ent. 57.
or 157. a.

And upon a Demurrer to this Plea it was adjudged ill, because it was laid, that the Defendant (who was the Garnishee) was attached by the Money in his Hands, whereas it ought to be, that Lawrence (the Defendant in the Action in London) was attached by the Money in Atherton's Hands, for so is the Custom, and so the Defendant had laid it to be in his Plea.

Lampton *versus* Collingwood. Trin. 5 Will.
& Mar. B. R. Rot. 509.

1 Salk. 262.
4 Mod. 314.
Where an
Audita querela,
and not a
Writ of Error,
will lie.

COLLINGWOOD obtained a Judgment for 40 l. Debt, and 40 s. Damages against Edward Crafter and Robert Lampton; and after the Year, &c. he brought a Sci. fa. upon that Judgment against Anne Lampton, Relict and Administratrix of the said Robert Lampton, suggesting the Recovery supra, and that Crafter died, and Robert Lampton him survived, and then he died, and that Anne Lampton was Administratrix; and upon two Sci. fa's and Nichils returned against her, he obtained Judgment against her as Administratrix of the surviving Debtor Robert Lampton.

Upon which Judgment the said Anne Lampton brought a Writ of Error in the same Court where the Judgment was, (viz.) Error coram vobis residen', and for Error assigned Matter of Fact, contrary to the Suggestion of the Sci. fa's.

It. That where by the Sci. fa's it is suggested, that Crafter died first, and Robert Lampton him survived, she averred, that Robert Lampton died first, and Edward Crafter him survived,

vided; upon which Issue was taken, and found for Anne Lampton the Plaintiff in the Writ of Error, (viz.) That Craster survised; and now it was moved in her Behalf, that the Judgment might be reversed, and no Body appearing for the Defendant,

Per Holt Chief Justice, a Writ of Error will not lie in this Case, but an Audita querela only; because the Fact assigned for Error is in the Suggestion of the Writ it self, and not in any of the Proceedings in the Cause; & adjournatur.

But afterwards it was adjudged, that a Writ of Error would not lie, wherefore the Plaintiff brought an Audita querela.

D E

Term. Sanct. Mich.

5 Willi. & Mariæ in B. R.

Seymour *versus* Greenvill.

IN Hillary-Term, 30 & 31 Car. 2. in B. R. Rot. 108. The Plaintiff Sir Joseph Seymour obtained a Judgment against the Defendant Bernard Greenvill, Esq; for 1000 l. Debt, and 8 l. Damages, but no Execution was taken out, nor any Writ of Elegit actually sued within a Year and a Day after the said Judgment

Elegit not taken out within a Year and a Day after the Judgment, but there being Continuances on the Roll, may be taken out at any Time without suing a *Scis fa*.

was obtained; and that the Plaintiff, without suing out any Sci. fa. against the Defendant in the Action, had now taken out an Elegit directed to the Sheriff of Berks, returnable the first Day of this Term; and thereupon an Inquisition was had, and the Lands of the Defendant delivered, &c. in Execution.

But the Plaintiff had now entered on the Roll of the said Judgment an Award of an Elegit, as of the same Term with the Judgment; and had continued it down with Vicecomes non misit Breve to the Time of the suing out the present Elegit.

And now it was moved to set aside the Execution of this Elegit, and to have Restitution, &c. because the suing out this Elegit was insufficient, for it ought to be actually taken out some Time within the Year and the Day after the Judgment; otherwise such an Award as this is, may be entered at any Time, paying only for the Continuances; and then the Party will thereby be tricked out of the Benefit which the Law gives him of Pleading any Matter post factum, upon the Sci. fa. which ought first to have been brought.

Curia.

Et per Curiam, That unless a Writ of Elegit was actually taken out within the Year and a Day, that the Award thereof afterwards would be to no Purpose; and therefore this Elegit was irregular without a Sci. fa. first sued out.

But, upon Examination of several of the ancient practicing Clerks then in Court, it appeared, that it had been the constant Practice amongst them for many Years, only to award an Elegit with Continuances on the Roll, and to take out that Writ at any Time afterwards, without suing out any Sci. fa. therefore the Court considering the Inconveniency of opening a Gap to destroy so many Executions, for this Irregularity, and because the Practice had prevailed so long, that it was now become the Law of the Court, ordered that the Execution should stand good.

Turner *versus* Felgate.

Raym. 73.
Sid. 125.
1 Lev. 95.
A Case by
the same
Names, but
to a different
Purpose.

IN Replevin for taking a Silver Tankard, &c. the Defendant Felgate avowed the Taking, &c. for that he was seized in Fee of an House in London, and being so seized, he by Indenture dated 9 Febr. 1680. demised the same to One Harris for sixty Years rendering Rent; and that afterwards

words he sold a Moiety of the Reversion to one Palmer, and for 150 l. de medietate redditus prædict' for 7 Years after the Sale of the other Moiety to the said Palmer, he (the Defendant) avowed the Taking, &c.

Where a
Traverse to
Part is ill.

The Plaintiff pleaded in Bar, That at the Time of the Lease made to Harris, and at the Time of the Defendant's Sale to Palmer, one Mary Chown was seised in Fee of a Moiety of the said House, and died seised; and that it descended to Thomas Chown her Son and Heir, who is still seised thereof; and that the Defendant was seised of the other Moiety, and sold it to Palmer, as he had set forth; by which Palmer was seised, and so the Defendant took the Tankard de injuria sua propria, and traversed that the Defendant was seised in Fee of a Moiety of the said Reversion, at the Time of the Taking the Tankard, or at any Time after the Sale to Palmer.

And upon a general Demurrer, the Plea in Bar was held ill, because the Plaintiff had laid a Seisin in Fee of one Moiety of the House in Mary Chown, at the Time of the Demise to Harris, and had not traversed the Defendant's Seisin of the Whole, as he had alledged in his Avowry, which was the principal Point to be traversed.

Judgment for the Defendant.

Smith *versus* Kemp, & al'.

Trespass by Levi Smith of Newbury against Kemp and others, Servants to one Harris, Parson of Newton in Hampshire.

Upon Not guilty pleaded, the Cause was tried at Winchester Assises, and the Plaintiff had a Verdict, and 2 d. Damages; and it was now moved in Arrest of Judgment, that the Declaration was ill, and that the Plaintiff could not maintain this Action.

The Declaration was, That the Defendants vi & armis clausum ipsius (the Plaintiff) vocat' Pecksmead apud paroch' de T. in Com' prædict' fregerunt & intraverunt & liberam piscariam ipsius (Plaintiff) in clauso prædicto cum retibus piscat' fuerunt & pisces inde, (viz.) 200 trucas, &c. ceperunt & asportaverunt, &c.

The Exception to this Declaration was, that Trespass vi & armis cannot be maintained by him who hath only liberam piscariam, for he is no more than a Commoner, and hath only a Liberty of Fishing with others, and not the entire

*4 Mod. 186.
2 Salk. 637.
Trespass vi
& armis lies
for taking
Fish in libera
piscaria.*

* 1 Inst. 122. a.
Cro. Car. 553.
And a Case
adjudged be-
tween *Peak*
and *Tucker*.
Hill. 1 & 2
Jac. 2. B. R.
Where Judg-
ment was
arrested up-
on the Mo-
tion of Mr.
Polluxen for
this very
Cause.

entire Fishing himself; for he hath neither the Property or Possession of the Fish in libera piscaria, but only a Privilege of raking them there; and therefore cannot maintain * Trespals vi & armis, no more than he who hath Common of Pasture.

And Justice G. Eyres cited a Case between Up John and Dawkins in the Reign of Ch. 2d. where the like Action was brought, and Judgment arrested for the like Cause, ut supra, and that he was Counsel for the Plaintiff in that Case, which is reported in 3 Mod 97.

Sed per Holt Chief Justice and Dolben, the Plaintiff had Judgment in Easter-Term 1693. Eyre Justice being of a contrary Opinion, and Gregory absent; and the Chief Justice grounded his Opinion upon the Authority of the Writ in the Register. Fo. 95. b. and F. N. B. 88. g.

But Justice Dolben seemed to differ this Case from the Register, because here it was laid to be libera piscaria in Clauso (of the Plaintiff) which amounts to separalis piscaria.

Delabastide versus Reynell.

4 Mod. 183.
*Homine re-
plegiando*, the
Proceedings
therein.

THE Plaintiff being a Switzer, married the Daughter of Mrs. Reynell by one Vincent her former Husband, and sometime afterwards a Difference arising between the Switzer and his Wife, she departed from him, and then the Husband procured out of Chancery a Homine replegiando directed to the Sheriff of Devon. to replevy his Wife, suggesting in this Writ, that Mr. Reynell and his Wife had taken and detained her; and after an Alias & pluries, the Sheriff returned on the Pluries into B. R. (where the Writ was, and ought to be returnable) that Reynell and his Wife had esloined the Plaintiff's Wife ad loca ignota, &c. so as he (the Sheriff) could not make Delivery, &c.

Nota; This Pluries was returnable quinden' Paschæ, and upon the very Day of the Return, the Defendants entered their Appearance with the Philazer of Devonshire in B. R. but notwithstanding this Appearance, the Plaintiff sued out a Capias in Withernam against the Defendants; and thereupon their Agent having Notice of it, summoned the Plaintiff before the Ch. Ju. Holt, who stayed the Withernam; and thereupon they moved the Court for a Superedeas to it, because they had entered their Appearance ut supra, and were ready, and did offer to plead non ceperunt, &c.

This was opposed by the Counsel for the Plaintiff; first, because this Plea is an Averment against the Sheriff's Return, and therefore ought not to be admitted; besides, admitting this Matter might be pleaded, yet before the Plea is received, the Defendant ought to Gage Deliverance, by giving Bail to make a Delivery of the Plaintiff's Wife, if the Issue non ceperunt should be found against them.

Sed per Holt Ch. Justice, Upon such a Writ, the Sheriff (not finding the Party) can make no other Return, but an Elongavit; for he cannot falsify the Suggestion of the Writ, and return Non ceperunt, because as to that Matter he is concluded by the Writ, and a Plea of Non ceperunt is not a direct Averment against the Sheriff's Return of Elongaverunt.

Therefore 'tis but reasonable, that since the Sheriff cannot return Non ceperunt, the Parties should be admitted to plead it in their own Defence; and as to the Gaging Deliverance, it ought not to be upon this Plea, because the Defendants deny the Taking, and therefore cannot Gage Deliverance of that which they have not; for a Gager of Deliverance is in no Case but where the Defendant admits the Taking, &c. and controverts the Property.

But in the principal Case, the Court obliged the Defendants to plead no other Plea than Non ceperunt, and that without any Delay, and thereupon they had a Rule for a Superedeas to the Witherham.

And Peter's Case, Mich. 1 W. & M. and Trevill's Case, Mich. 3 W. & M. were cited as Authorities for this Practice of the Defendant's Appearing upon the Return of the Homine replegiando, &c.

The King *versus* Parishioners of Huntingdon.

THE Case, *scilicet* One Andrew Lucas, a poor Man, dwelling in Lancashire, was by Order of two Justices of that County, removed unto the Parish of Huntingdon in Cheshire, as being last legally settled there.

After this Removal, two Justices of Cheshire make an original Order, reciting, that the said Lucas, since his Residence in the Parish of Huntingdon aforesaid, was legally settled in the Parish of Stook in the County of Hereford, and therefore they removed him to Stook; and now this Cheshire Order being removed into B. R. by Certiorari,

Order of Removal quash'd, because it was not set forth, that the Place to which the poor Man was sent, was the last Place of his legal Settlement.

The

The chief Question was, Whether a foreign County is so far obliged by the Order of two Justices of another County, that they have no other Remedy but by Way of Appeal from that Order to the next general Quarter-Sessions held for the County where the Order was made.

Or whether two other Justices of the foreign County may make another original Order; and send the poor Man to a third Place, *ut supra*.

And it was insisted, that this Cheshire Order *supra*, is good, otherwise a foreign County would be without Remedy, because the Appeal must be to the next Sessions where the first Order was made; and it may happen that Sessions may be over before the foreign County may have Notice of the Order, or at least before they can possibly come to the Place where the Sessions is held, if the Counties are at a great Distance, and the Order should be made a very little Time before the Sessions.

And farther, that in this Case the second Order did not interfere with the first, because the Person chargeable is not sent back to the Place from whence he came, but to a third Place, which was the Place of his last Residence.

The Court doubted of this Matter, and raised a Question, Whether the next Sessions shall be taken to be the next after the Making the Order, or the next after the Parties find themselves aggrieved.

But it was agreed by all, that two Justices of the foreign County could not, by an Order, send the poor Man back again to the Place from whence he came, for that would make an Interfering of Jurisdiction.

At last this Order was quashed, as being informal, (*viz.*) for that it did not recite, that Lucas was last lawfully settled at Stook, but only that he was settled there since he resided at Hontingdon; and so the Points *supra* were not determined.

Cook *versus* Darbison.

In Ejectment, the Demise was laid before the Plaintiff had any Title.

ERROR to reverse a Judgment in Ejectment in C. B. given for the Plaintiff; and the Error assigned was, that it appeared upon the Record, that the Demise to the Plaintiff was made on the 20th Day of January, 1692, which was the Essoin-Day, and so the first Day of Hillary-Term.

I

And

And it appeared likewise by the Placita, &c. that the Declaration was of the same Hillary-Term, which relates also to the first Day, and so the Action was brought by the Plaintiff before his Title accrewed, or at least on the very same Day, which cannot be, because the Law allows no Fractions of Days.

Sed per Curiam, This being after a Verdict, the Chief Justice said, that if the Plaintiff in Error would take Advantage of this Matter, he should have alledged Diminution, and procured the original Writ to be certified; and if that was returnable before the Plaintiff's Title, it would have been Error.

Midgley and Gilbert *versus* Lovelace. Trin. 5
Will. & Mar. B. R. Rot. 625.

THE Case was, *sc.* One Keightley demised an House to Jones for a certain Term of Years, rendering Rent; Jones assigned the Term to the Defendant Lovelace, and Keightley by his Last Will, devised a Moiety of the Reversion unto Midgley, and the other Moiety to Gilbert, and died; and now Midgley and Gilbert join in an Action of Covenant, and assign the Breach in Non-payment of the Rent.

Tenants in Common may join in an Action of Debt or Covenant.

The Defendant pleaded, that after the Rent became due, and before the Action was brought, the Plaintiffs had by Fine, &c. granted Reversion to one Hawkins, and concluded in Bar.

And upon a Demurrer to this Plea, two Questions were made:

(1.) Whether the Plaintiffs ought to sever in this Action, or in an Action of Debt for this Rent, because they are not joint Lessors, but have each of them a several and distinct Interest to a Moiety of the Reversion.

To which it was answered and resolved, that the Plaintiffs are Tenants in Common, who may join or sever (at Election) in an Action of Debt for Rent reserved.

Sed per Holt Ch. Justice, If they sever in Debt, &c. they must not each of them make his Demand of such a certain Sum, which amounts to a Moiety, but the Demand must be de una medietate of the whole Rent, and therefore if they may join in Debt, they may likewise join in Covenant.

Sid. 462.
contra.

Covenant
lies against
an Assignee
of a Term
upon the Pri-
vity of Con-
tract.

(2.) The other Question was, Whether the Arrears of Rent are not lost to the Plaintiffs, by their Granting the Reversion to another, because the Privity between them and the Defendant was thereby destroyed.

Sid. 157, 402.
Raym. 80.

As to that Matter it was answered likewise and resolved, that this Action was maintainable for the Arrears of the Rent, notwithstanding the Reversion was out of the Plaintiffs; for tho' the Defendant was but an Assignee of a Term, yet the very Privity of Contract was transferred by the Statute of H. 8. which gives the Action for and against Assignees; and the Contract still remains, tho' the Privity of Estate is gone.

Et per Curiam, Debt will lie in this Case for Arrears of Rent, a fortiori Covenant, &c.

Judgment for the Plaintiff.

Leonard qui tam, &c. *versus* Beech.

Popular Ac-
tion not
within the
Statute 21
Jac. 1. cap. 4.
Curia.

DEBT qui tam, &c. for the King and the City of London, as for himself for 300 l. upon the Statute 1 Jac. 1. cap. 22. par. 37. against the Defendant, a Searcher and Sealer of Leather in London.

The Declaration was general, that the Defendant being a Searcher and Sealer, and sworn according to the Statute primo die Septembris Anno 4. &c. apud H. colore officii sui præd. allocavit & sigillavit 150 Coria insufficienter tannat. &c. contra formam Statuti, per quod he had forfeited 300 l. (viz.) 40 s. for every Hide.

Upon Not guilty pleaded, the Plaintiff had a Verdict; and it was now moved in Arrest of Judgment, that the Offence was laid to be on one Day, and not as it ought to be, (viz.) diversis diebus & vicibus, between such a Day and such a Day.

Besides, 'tis not laid, that the Defendant separatim allocavit & sigillavit, so that it doth not appear, but that the 150 Hides might be tack'd together, and the Allowance of them but one Act, and so but one Offence, and then but one 40 s. is forfeited, and no more.

(2.) That this Case is within the Statute 21 Jac. 1. cap. 4. which restrains popular Actions to be brought within the proper County, and to be tried before the Justices of Peace; therefore this Action being brought in B. R. tho' laid in London, 'tis coram non iudice.

To which it was answered, and so resolved per Curiam, ^{Curia.} that this Offence was well laid, and that it could never be intended, that the One hundred and fifty Pides were all allowed at one Time, because 'tis enacted by the Statute, that every Pide shall be severally sealed, and there is no other Method of Allowance, but by Sealing; and if but one Offence, and that committed on one Day, the Statute would be illuded and useless.

And as to the last Objection, per Curiam, this is not within the Statute 21 Jac. because that Statute doth not give any Jurisdiction to the Justices of Peace, and they have no Power to enquire of any Offence against that Statute. ^{Cro. Car. 112, 146. 1 Sid. 303, 400.}

Et per Curiam, Not guilty is a good Plea to this Action.

Judgment for the Plaintiff.

Yaxley's Case.

HE was committed by the Earl of Nottingham, Secretary of State, by Virtue of the Statute 35 Eliz. for refusing to answer, being demanded, whether he was a Jesuit, Seminary, or massing Priest; and now he brought an Habeas Corpus, and prayed to be bailed. ^{35 El. c. 2. Par. 11. Commitment ill concluded.}

And an Exception was taken to the Commitment, for that the Conclusion thereof was, (viz.) There to remain until he shall be from thence discharged by due Course of Law, when the Words of the Statute are, until he shall answer unto the Questions; and therefore the Commitment ought to be special, according to the Statute, and the * Churchwardens of Northampton's Case was cited, and relied on. ^{* Antea.}

Besides the Commitment ought to be by a Justice of Peace, and a Secretary of State is no sworn Justice; and it was objected, that the Habeas Corpus Act had suspended this Statute.

Sed per Curiam, both these last Objections were overruled, but for the first, the Court held the Commitment ill.

Then they asked the same Questions of the Defendant, who answered openly and directly in the Negative; and thereupon he was discharged.

Gilmore *versus* Harris.

Power of
Revocation
where well
pursued.

UPON a special Verdict in Ejectment, the Case was as followeth :

¶ Edward Mountford settled his Lands now in Question to the Use of himself in Tail, Remainder to Simon Mountford, and the Heirs Males of his Body lawfully begotten, Remainder to Sir Edward Mountford in Tail, Remainder in Fee to his own right Heirs.

In this Deed of Settlement there was a single Power of Revocation reserved to Edward Mountford, to revoke the Estate only limited to Simon Mountford, and to limit new Uses instead thereof.

Afterwards the said Edward Mountford, by a Deed subsequent to the said Settlement, reciting, that whereas he had a Power to revoke the Uses limited by the said Settlement unto Simon Mountford and his Heirs Males, and so misrecites the Estate of Simon, by omitting the following Words, (viz.) of his Body begotten ; he declared that he did revoke the said Uses to Simon Mountford and his Heirs Males, and afterwards in the same Deed, by way of new Use, he limits the said Estate to the said Simon and his Heirs Males, without saying of his Body begotten

And upon this Verdict two Questions were made.

(1.) Whether this was a good Revocation of the first Use, because of the Misrecital of the Estate of Simon.

And adjudged that it was a good Revocation ; for such are to be favoured, and the Intent of the Party is to be observed.

(2.) The next Question was, Whether this new Estate limited to Simon Mountford, was a Fee-simple, as springing out of all the Estates of Edward Mountford ; or otherwise whether it was the like Estate-Tail by Intendment, as before.

And adjudged that it was an Estate-Tail ; for if it should be construed a Fee-simple, then the Remainder to Sir Edward Mountford would be destroyed, which Edward had not Power to do.

Neath

Neath *versus* Reeve. Trin. 5 W. & M. B. R.
Rot. 188.

ERROR in B. R. of a Judgment in the Palace-Court in an assumpsit, and the Error insisted on was, That the Plaint which is the Original in that inferior Court was general, (viz.) Johannes Reeve queritur de T. Neath de placito transgressionis super Casum in the Plaintiff's own and proper Right, but he declared as Executor of Felix Bayram for so much Money received to the Use of the Plaintiff as Executor, &c.

Judgment
reversed for
a Variance
in the De-
claration.

Et per Curiam, This is such a Variance as is inconsistent, and therefore the Judgment was reversed.

The King *versus* Barlow and Jeans, Churchwardens of the Parish of St. Warburgh in Derby.

THE Churchwardens were indicted upon the Statute * 14 Car. 2. reciting, that whereas A. B. and C. &c. Constables of the five Parishes within the Bill of Derby, had expended such Sums of Money in conveying Persons by Passes, and that J. S. and E. G. two Justices of the Peace, had issued out their Order unto the Constables, Churchwardens, and Overseers of the Poor of the said five Parishes, commanding them to meet at such a Time and Place, to make a Rate for the Reimbursement of the said Constables; and that the Defendants did accordingly meet, but refused to join in making such Rate, &c.

* 14 Car. 2.
cap. 12.
Paragraph
18.
Indictment
for not making a Rate
to reimburse
the Constables.

This Indictment being removed into B. R. it was moved to quash it.

(1.) First, That the Warrant of the two Justices was to make a joint Rate for all the five Parishes, which is ill, because 'tis not according to the Direction of the Statute, nor equal in it self, because the Charges of several Constables, may be unequal; and every Parish is liable only to the Charges of its own Constable.

Besides, they are not compellable by the Statute to make a Rate, for the Words are, that they may make one, and so at their Election.

But the Court would not quash the Indictment, because the Defendants were blameable, it being very reasonable that

that the Constables should be reimbursed; and therefore as to the first Objection, (viz.) The Inequality of the Charges of the several Parishes, it shall be taken *Reddendo singula singulis*.

And as to the other Objection, that the Words of the Statute are, that they may make a Rate, and so 'tis at their Election, whether they will make one or not: *Per Curiam*, where a Statute saith, that such a Thing may be done, 'tis always understood it must be done.

D E

Term. Sanct. Hill.

5 Willi' & Mariæ, B. R.

Child & al' *versus* Sands. Trin. 4 W. & M.
B. R. Rot. 129.

4 Mod. 176.
S. C.
Salk. 31.
S. C.
3 Lev. 351.
S. C.

Action for
suing in the
Admiralty.

W RIT of Error on a Judgment in C. B. upon a Special Verdict there found in an Action on the Case, grounded upon the Statute 13 R. 2. 15 R. 2. and 2 H. 4. cap. 11. for suing in the Court of Admiralty, &c.

The Case upon the Special Verdict appeared as followeth:

H. Sands was a Merchant of London, and sole Owner of such a Ship, whereon he and several other Merchants
had

had loaded Goods to a very great Value, designing a Voyage to the East Indies.

Whilst this Ship lay thus loaded in the River Thames ready to sail, Sir Josiah Child, and others, Members of the East-India Company, made Application to King Car. 2. (in Behalf of the Company) and his Council, for the King's Warrant to stop this Ship from her intended Voyage, suggesting that she was an Interloper, and about to trade contrary to the Prohibition of the Charter of that Company, and thereupon the King's Warrant was obtained.

Afterwards the said Sir Josiah Child, and others, &c. applied to the Court of Admiralty, for Process to arrest the said Ship and Goods, and accordingly they obtained a Warrant from that Court in Nature of an Attachment, in Virtue whereof the said Ship and Goods were actually arrested, by which Means the Voyage was lost.

And Sands alone (who was the only Owner of the Ship and of some Part of the Goods) brought this Action against Sir Josiah Child, and others, Members of the East-India Company, who acted in this Matter; and the Jury found for the Plaintiff, and gave 750 l. Damages; and after Argument, the Plaintiff had Judgment for the said Damages in Duplo, (viz.) for 1500 l. and also double Costs, according to the Statute 2 H. 4. which Judgment was obtained in the Court of Common Pleas.

And now upon a Writ of Error brought in B. R. it was argued, that this Judgment was erroneous.

(1.) For that this Action is brought by Sands alone, when all the Part-Owners of the Loading ought to have joined.

To which it was answered, and so resolved, that this Action was grounded merely on a Tort, therefore 'tis severable in its Nature, and not like the Case of Boson and Sandford in B. R. for that was an Action grounded on a Contract in Law, and therefore all Parties to such a Contract must be likewise Parties to the Suit; but this is in Nature of a Trespass.

(2.) Objection, A. There is nothing found in this Verdict to bring the Defendants in the original Action within the Penalty of the Statute 2 H. 4.

Because it appears, that the Ship was stopped by Virtue of the King's Warrant, which in this Case the King might well do, for the Warrant is no general Prohibition to trade, but a particular Prohibition to trade with Infidels; and as a Security only against such special Trading.

Besides,

18 Ed. 3. 25.
29 Affis,
pl. 23.
14 Ed. 3. 23. b.
Dyer 159,
251.

Dyer 177,
196.

Reg. 281.
2 Brownl.
296.

Besides, the Prosecution which is found to be made by Sir Josiah Child, &c. in the Admiralty-Court, is not such a Prosecution as is intended by the Statute, because there was no Suit in that Court against Sands, but only a Warrant to arrest the Ship, and no Libel against any Person; and the Words of the Statute are, That the Party grieved shall have his Action against him who pursues in that Court, which must be intended of a Suit by Way of Libel, inter partes; besides, it appears that Sir Josiah Child, and the others, were but Agents to the Company, (i. e.) no other but their Attornies; and an Attorney of the Party suing in the Admiralty is not within the Penalty of this Statute; for it being a penal Law, it cannot be extended by any Construction.

To all which it was answered, and so resolved, that it plainly appeared by what was found upon Record, that the Defendants in this Action had incurred the Penalty of the Statute 2 H. 4. for the common Course of Proceedings in the Admiralty, in Cases of this Nature, is by Process to arrest the Ship; and 'tis that which brings in the Proprietors pro interesse suo, and then the Libel follows; therefore he who procures this first Process out of that Court, doth prosecute and pursue therein, which are the Words of the Statute.

Therefore the Defendants being found to have procured the Admiralty Process, and the Ship and Goods to be arrested thereon, this is a full Prosecution according to the Course of that Court, and such Evasions have always been disallowed.

Hob. 87.

Godb. 385,
387.

(3.) The third Objection was, that this Action is laid for consequential Damages, (viz.) per quod he lost the Profits of his Voyage, which ought not to be in an Action grounded on this general Statute.

(4.) And lastly, that the Plaintiff ought not to have double Costs.

To both which Objections it was answered, and so resolved, that as to the consequential Damages, the Laying it specially was but Matter ex abundanti, for those Damages might have been given in Evidence, tho' not mentioned in the Declaration, as in Battery or Whipping for Breaking a Limb, &c. the Loss of the Plaintiff's Time may be given in Evidence upon the common Declaration; therefore in this Case the Plaintiff ought to recover conse-

quential

quential Damages for his Loss; and the Laying them specially cannot hurt.

And as to the Costs, which are doubled, as well as the Damages, 'tis a Rule, that in all Cases where Damages and Costs are given at Common Law, and a Penalty is added by a Statute, with double Damages, that also draws double Costs.

See the Case between *Lawson and Story, postea.*
Dyer 139.

As to the Excuse, that the Defendants were only Agents to the Company, 'tis not found that they commanded them so to do; or if they had, it would not have excused them from the Penalty, for 'tis at their Peril to obey such illegal Commands.

And the King's Warrant will not mend the Matter, because the Defendant's Application to the King in Council was illegal; and for that the Statute 16 Car. 1. cap. 10. par. 5 was cited.

It was agreed, that the King may grant Embargoes on Ships in Time of War, or may employ the Ships of his Subjects in Time of Danger, for the Service and Defence of the Nation; but this Warrant was not in the Nature of an Embargo, for it was only to stay a single Ship, and not in any Time of War or Danger, or for the Defence of the Nation; and the Pretence of a Prohibition for not trading with Infidels, goes no farther than those named in the Charter of this Company, so that it appears all was done with a private Respect only, wherefore 'tis altogether void.

And for the Reasons aforesaid the Judgment was affirmed.

The Lord Banbury's Case.

HE was indicted at the Old Baily for Murder, by the Name of Charles Knolls Esq; and being brought up to the Bar by Habeas Corpus, this Indictment was removed, and this Matter returned for the Cause of his Imprisonment.

Then he exhibited his * Plea ready engrossed in Parchment, which upon his Prayer was received; and it was a Plea in Abatement of the Indictment, and began thus:

Jf. Carolus comes Bimbury sub custodia Willi. Richardson Gen. custode Gaolæ Dominorum Regis & Reginae de
Q q Newgate

2 Salk. 309.
512. - *Rice v. 517. l. Clayton.*
Plea of a *B. 2. Smith*
Misnomer in 204 Comb.
Abatement *273.*
to an Indict-
ment.

* *Note, This Plea was put in Hilary 4.*

Newgate virtute brevis Dominorum Regis & Reginae de habend. Corpus ad subjiciend. &c. ei direct. in cujus custodia praesentea ex causa praedict. per nomen Caroli Comitis Banbury alias dict. Caroli Knolls Ar. commiss. fuit ad barram hic duct. in propria persona sua & statim de praemissis ei superius imposit. allocutus qualiter se velit inde acquietari dicit quod ipse est persona in indictamento praedict. mentionat. & intens. per nomen Caroli Knowles de paroch. Sancti Egidii in Campis in Com. Middlesex, &c. & versus quem indictamentum praedict. prolat. existit pro feloniam & murdro praedict. & dicit quod ipse ad indictamentum illud respondere compelli non debet quia dicit quod Dominus Carolus primus nuper Rex Angliae, &c. per literas suas patentes now produced, &c. created his Grandfather an Earl of this Kingdom, &c. and thereby the Honour was entailed upon the Male Line, and then shews his own Descent; and that he is Heir Male, and Earl of Banbury, and concludes with hoc paratus est verificare, unde ex quo non nominatur in indictamento praedict. per nomen Comitis Banbury petit judicium de indictamento illo & si ipse ad indictamentum ill. ulterius respondere compelli debeat, &c.

The Attorney General replied, setting forth, by Way of Estoppel, an Order of the House of Lords, in the then last Sessions of Parliament, by which it appeared, that upon the Petition of the Defendant to the House of Peers, to be admitted therein as a Peer of this Realm; his Right of Peccage was thereupon examined, according to the Course of that House, and afterwards carried against him, (viz.) That he had no Right to sit in that House as a Peer of the Realm; and this was relied to be such a Determination of the Matter, that all inferior Jurisdictions were concluded.

See Style 80.
The Lord Rivers's Case.

But the Defendant's Counsel finding some Errors in the Plea, moved for Leave to amend them, by adding two necessary Averments.

1. That his Uncle, who was of the elder Branch, was dead without Issue, and that he himself was a Peer at the Time of this Plea pleaded; and after several Debates, it was at last, by the Opinion of Dolben and Eyre Justices, amended in both these Points, (Gregory Justice being absent) and Holt Ch. Justice of another Opinion against the Amendment, and thereupon the Lord Banbury was bailed.

And afterwards he demurred to this Replication, and the Matter being argued and debated, it was at last adjudged.

(1.) That a Plea in Abatement is proper to an Indictment, and in particular this Plea of Misnomer.

(2.) That this Plea was well concluded with hoc paratus est Verificare generally, although it was very much insisted on, that it should be concluded prout patet per Recordum, because Peer or no Peer is triable only by Record, which was admitted per Curiam; but then 'tis in a Case where a Man is made a Peer by Writ only, (viz.) by being summoned to sit in Parliament in the House of Peers by Writ, which was the ancient Method of creating such Honours.

But in this Case the Creation was by Patent of Record, which was brought into Court, and proves it self, (viz.) by the Great Seal; besides here are several Descents which are Matters of Fact, and triable only by the Country, so that the Defendant doth not claim the Honour from the Crown immediately, but only mediately as his Male descended from him to whom the Honour was first given.

22 Affise
placito 14,
24.
2 Leon. 48.
Stile 257,
177.
W. Jones 9.

But if the Defendant was the very Person ennobled either by Writ or Patent, then there would be nothing to try, but Matter of Record.

(3.) It was adjudged, that this Order of the House of Lords would not conclude this Court in a Case properly within their Jurisdiction, and in a Matter concerning the Right of the Subject, and coming before the Court in a judicial Way; and as this Case is, the Judgment of this Court will not lessen the Authority of that Order, for be it either way, it will not influence the Defendant's Right of Peerage, or give him any Right to sit in the House of Lords as a Peer, for as to that Matter he must stand or fall by the Judgment of that House.

4 Inst. 126,
127, 355.
Plowd. 117.
Dyer 101.
Staundf. 155,
153.
1 Inst. 9. 16.
9 Rep. 49,
117.
11 Rep. Ld.
Delamer's
Case.
Riley pl'ta
Parliament
12, 44.
Cott. Re-
cord' 703.
Stile 234
Sid. 22, 23.

So that the Judgment of this Court is upon no other Point than whether the Defendant ought to have the Addition of Comes Banbury given him in the Indictment, or not; and per totam Curiam, the Plea was held good, and the Replication ill; therefore the Indictment was abated, and the Defendant was discharged.

D E

Term. Paschæ.

6 Will. & Mariæ B. R.

Foden *versus* Haines. Trin. 5 W. & M. B. R.
Rot. 1040.

Pleadings in
Debt upon a
Sheriff's
Bond.

DEBT upon Bond of One hundred and Twenty Pounds; the Defendant craved Oyer of the Condition, which was for the Payment of Sixty Pounds to the Plaintiff, by the Defendant, or one Kinnerly, at a Day certain, &c.

23 H. 6.

Then the Defendant pleaded in Bar the Statute of H. 6. concerning Sheriffs Bonds, and then set forth that Kinnerly was taken by Virtue of a Capias Urlegatum in a civil Action by T. S. then Sheriff of Staffordshire, and that the Plaintiff was at the same Time Under-Sheriff to the said T. S. of the said County of Stafford, and that Kinnerly being then under an Arrest, and in Custody, he together with the Defendant Haines sealed and delivered the Bond in the Declaration mentioned pro Easimento & favore præfat' T. Kinnerly de imprisonamento suo prædict' per eundem T. Foden tunc subvic' prædict' Com' Stafford' existen' demonstrand' & pro deliberatione ejusdem T. Kinnerly abinde habend' & obtinend', &c.

The Plaintiff replied, that the Defendant pro meliore securitate ipsius T. Foden quod prædict' T. Kinnerly non evaderet extra Custodiam ipsius T. Foden sed remaneret in salva custodia ipsius T. Foden fecit scriptum obligatorium prædict' in narratione prædicta nominatum absque hoc quod prædict' Joh'es Haines pro easimento & favore præfat' T. Kinnerly

nersly de imprisonment suo prædict' dand' seu demonstrand' scriptum obligatorium prædict' in prædict' narratione mentionatum præfat' Tho. Foden sigillavit & ut factum suum deliberavit modo & forma, &c.

And upon a general Demurrer to this Replication, after several Debates the Court gave Judgment for the Defendant, because the Plaintiff of his own Shewing had made the Bond void at Common Law; it appearing upon Oyer of the Condition, that it was made for the Payment of a certain Sum of Money; and yet in the Indisment to the Traverse in his Replication, he alledged, that it was made for the Sheriff's Security, that Kinnerly should not Escape.

Now this is an Averment against the Condition of the Bond, to which an Obligor shall never be admitted; besides 'tis not lawful for the Plaintiff to take an absolute Bond with a Condition to pay Money, under Pretence of Security against Escapes, without mentioning it.

Sed nota; The Obligor in this Case, and also in the Case of Simony and Alury, is admitted to aver against the Condition of a Bond, or against the Bond it self, for Necessity's Sake; wherefore the Plaintiff hearing the Opinion of the Court, moved for Leave to discontinue upon Payment of Costs; which was granted.

Abney and Hedges, Sheriffs of London, versus White.

THE Plaintiffs brought an Action of Debt against the Defendant White upon a Bail-Bond, and declared generally as upon other Bonds, (viz.) That the Defendant bound himself to them in so much Money without saying per nomina Vicecomitum Civitat' London, as is usual in such Cases.

Debt upon
a Sheriff's
Bond.

The Defendant prayed Oyer generally of the Bond and Condition, and made the Entry in the usual Form, (viz.) petit auditum scripti obligatorii prædict' & ei legitur, &c. petit etiam auditum conditionis scripti illius & ei legitur in hæc verba.

Then he pleaded the Statute 23 H. 6. against Sheriffs Bonds, &c. and sets forth an Arrest, &c. and that this Bond was taken for Ease and Favour.

The

The Plaintiffs perceiving their Mistake of omitting per nomina Vicecom', enter upon the Record the Defendants praying Oyer of the Bond, &c. and then they set forth the Bond it self, as well as the Condition thereof, & petunt quod scrip' præd' irrotuletur & irrotuletur in hæc verba; by which it appeared, that it was taken by them, by the Name of Sheriffs of the City of London, in express Words, as usual.

Then they reply and confess they were Sheriffs of London, &c. and the Arrest, &c. and the Bond was taken by them per nomina Vic' Civitatis London' sub conditione prædicta to discharge the Party from the Arrest, absq; hoc, that it was taken for Case and Favour.

And upon a Demurrer to this Replication, it was held per Curiam, that notwithstanding the Defendant had entered the Oyer of the Bond with an, &c. only, (viz.) & ei legitur, &c. Yet the Plaintiff might enter it at large on the Record; and by so doing he had avoided the Defendant's Plea of the Statute, because now it appeared on Record, that the Bond was taken by the Plaintiffs, by the Name of Sheriffs, &c. and that the Variance between the Bond and the Declaration was not material; neither was it any Departure in the Replication to say, it was taken by them per nomina Vic'; so the Plaintiffs had * Judgment.

* The like Judgment in C. B. between

Blewitt, &c. Vic' London' versus Comley, Trin. 10 Will. Rot. 1336.

Nichols *versus* Pawlett.

Plea in Abatement, that the Plaintiff was an Alien Enemy.

See Raft. Ent. 252. b. Ashton Ent. fo. 11. Hern 361, the like Replications.

THE Defendant pleaded in Abatement, that the Plaintiff was an Alien Enemy, born in such a Place in France.

The Plaintiff replied, That he is Indigena, and born at such a Place in the Kingdom of England, & non alienigena modo & forma prout, &c. & hoc petit quod inquiretur per patriam.

And upon a Demurrer to this Replication, it was held per Curiam to be ill, for that the Plaintiff did not rely upon the first Part of it, that he was born in England, and so conclude with an Abatement, that an Issue might be taken by the other Side, (viz.) That he was not born in England, and that this Matter might be triable by a proper Vile; but here he hath put Alien, or not Alien, in Issue, (viz.)

(viz.) Non alienigena modo & forma, which cannot be tried for Want of a Visne; so Judgment was given, that the Bill shall abate.

Nota; If the Plaintiff had concluded his Replication Surplusage, with an Averment only, the negative Clause, Non alienigena, had been only Surplusage, and helped upon a general Demurrer.

Clerke *versus* Moor. Mich. 5 Will. & Mar.
B. R. Rot. 458.

SIR Robert Clerke and Peter Peel brought an Audita querela against Moor, suggesting that he (Moor) had obtained a Judgment against them for 40 l. Debt, and 4 l. 8 s. 2 d. Damages, and that Peel had been taken in Execution by Virtue of a Ca. sa. upon that Judgment, and afterwards was suffered to escape, and go at large by Consent of the said Moor, who had again very lately taken out a new Execution on the same Judgment against both the now Plaintiffs, upon which they pray to be relieved, and likewise pray Process against Moor, and thereupon a Sci. fa. was awarded against him, and after that an alias Sci. fa. and after two Nichils returned, the Plaintiffs entered their Prayer, that the Court would proceed to examine the Matter, and that they might be discharged, &c.

1 Salk. 91.
Audita querela, the Process thereon.

And this Cause being put in the Paper for a Concilium, the Defendant Moor appeared, and by his Counsel informed the Court, that he had been surprised, and had no Notice of these Sci. facias's; and farther insisted, that Process of Sci. fa. did not lie in this Case, because the Audita querela was not grounded on any Deed, but upon a meer Suggestion of Matter of Fact only, and therefore the Process ought to be a Venire facias; wherefore it was prayed, that the Sci. facias's might be quashed.

And after several Debates it was quashed, for per Curiam such Process doth not lie in this Case.

Et per Curiam, Where an Audita querela is brought by a Person actually in Execution; or if at large, and he founds his Writ upon some Deed of the other Party; in both these Cases a Sci. fa. is the Process.

But where 'tis brought by a Person at large, and upon a bare Suggestion of Matter of Fact (as in the present Case)

Moor 811.
See the Books
of Entries.

Case) there the only Process is a Venire facias, and upon that a Distress infinite.

Alston & al' *versus* Buscough. Hill. 5 Will. & Mar. B. R. Rot. 470.

2 Cro. 70,
362.
Debt for not
setting out
Tithes, the
Declaration
was ill, and
for what
Reason.

IN an Action of Debt upon the Statute 2 Ed. 6. of Tithes, wherein the Plaintiff demanded the treble Value, &c.

Upon Nil debet pleaded, the Plaintiff had a Verdict in C. B. and upon a Writ of Error brought in B. R. it was very much insisted on, that the Declaration was ill, because the Plaintiffs had only alledged, that the Defendant had carried away the Corn, without setting out the Tithes; but did not aver that the Defendant had not made any Agreement with them for the Tithes, for the Statute gives the Penalty where the Tithes are carried off without any Agreement made for so doing; therefore if the Defendant had agreed with the Plaintiffs for carrying off the Corn, without setting out the Tithes, (as it doth not appear but he might) then it had been no Forfeiture.

Sid. 218.
Verdict cu-
red a Fault
in a Decla-
ration.

And the Court was of that Opinion, (viz.) That the Declaration was ill, for the Reason supra, if it had been upon a Demurrer; but this was helped by the Verdict; for if there had been any Agreement proved at the Trial, the Plaintiff could not have obtained a Verdict.

Hool *versus* Burgoigne. Pas. 6 Will. & Mar. B. R. Rot. 330.

Taliter pro-
cessum fuit,
where good,
where not.

IN an Action of Debt the Plaintiff declared, that where- as he farmed of the Defendant several Lands lying in Winsford in the County of Somerset, under an yearly Rent; and whereas on such a Day he had paid 10 l. Parcel thereof, to the Defendant, he by his Deed dated on the same Day, in Consideration of the Receipt of the said 10 l. did oblige himself and his Heirs, &c. unto the Plaintiff in the Sum of 20 l. to defend him against Julian Whitefield, who had lately made a pretended Claim to the Estate, which the Plaintiff held of the Defendant; and also to defend the Plaintiff against any Person or Persons

Persons whatsoever, prout per scriptum prædict. plenius apparet.

Then the Plaintiff averred in Fact, that afterwards, (viz.) In such a Term, the said Julian Whitefield implacitavit eidem (the Plaintiff) in the Court of Exchequer, before the Barons, &c. in placito debiti pro recuperatione prædict. summæ 10 l. eidem (the Defendant) per eundem (the Plaintiff) sic ut præfertur solut. inter alia, for the Rent of the said Land, which the Plaintiff, at the Time of the Making the said Deed, farmed of the Defendant; and that the said Julian, by Process of the said Court of Exchequer, had compelled the Plaintiff to appear to answer him in the Plea aforesaid. Co. Ent. 324.

Taliterq; superinde in eadem Curia de Scaccario in placito illo processum fuit quod postea scilicet (in such a Term) consideratum fuit per eandem Curiam quod præd. Juliana Whitefield recuperaret 80 l. Debt, and 7 l. for Damages, &c. prout per Recordum inde in Curia de Scaccario prædict. apud Westm. prædict. remanen. plenius liquet & apparet, to the Execution of which Judgment the Plaintiff stands daily liable; and farther avers, that he gave the Defendant Notice of this Prosecution the same Day on which it commenced, but that the Defendant had not defended the Plaintiff against the said Julian Whitefield, and refused so to do, unde actio accrevit, &c.

To this Declaration the Defendant demurred specially, shewing for Cause, that the Record of the Recovery specified in the Declaration was not sufficiently alledged, and the Plaintiff joined in Demurrer.

The Question was, Whether this brief Way of Pleading the Recovery inter alia, was sufficient in this Case where the Recovery is the only Breach, and alledged as the Cause of Action.

And it was insisted for the Defendant, that the whole Record of the Recovery ought to be set forth at large in the Declaration. 22 Ed. 4. 8.
put in Plowden 65.

Sed per Curiam non allocatur, for at this Day 'tis otherwise practised; and 'tis sufficient to plead, that the Plaintiff recovered with a Taliter processum fuit, without reciting the whole Record.

Et per Holt Chief Justice, This Declaration is too general, and that the Plaintiff should at least have set the Matter out in this Form:

R r

¶ That

It. That he was impleaded in an Action of Debt for so much Money certain (of which this was Parcel) or have set forth the whole Declaration in the Action brought by Julian Whitefield, with Taliter superinde processum suit, so as it might appear to the Court, that the Recovery was against the Plaintiff for the same Matter, against which he was to be defended by the Defendant, for that in this Case he could plead no other Plea than Nul tiel Record; and upon his Opinion

Judgment was given against the Plaintiff.

The King and Queen *versus* Larwood.

Where the Defendant shall not be permitted to disable himself.

13 Car. 2.
cap. 1. par. 12.

AN Information was exhibited against the Defendant, for refusing to take upon him the Office of Sheriff of the City of Norwich, being thereunto duly elected.

The Defendant pleaded the Statute 13 Car. 2. by which 'tis enacted, that a Person elected into any Office in a Corporation, shall be such as within one Year before hath taken the Sacrament, according to the Church of England, or else the Election shall be void; and averred, that he had not taken the Sacrament, &c. at any Time within one Year next before the Election of him to be Sheriff, &c. wherefore the Election was void.

The Attorney General replied, and set forth that Part of the Act of Uniformity, by which every Person is obliged to take the Sacrament three Times in the Year, according to the Liturgy, &c.

The Defendant rejoined, and set forth the new Act of Parliament for tolerating * Dissenters, to which there was a Demurrer.

Et per Holt Ch. Justice & Curiam, after many Arguments, Judgment was given against the Defendant.

And first as to the Pleading, they held, that the Defendant's Rejoinder was a Departure from his Plea, and therefore he could have no Advantage of the Act of † Toleration, supposing it was for his Purpose, for 'tis a private Statute, and must be pleaded, and therefore no Opinion was given concerning the Influence of that Statute in this Case, because it was not judicially before the Court; so they grounded their Opinions upon the Insufficiency of the Plea, taking it to stand singly upon the Statute 13 Car. 2.

† There is a Difference where a second Statute affirms the first, and where 'tis of new Matter, as here, 1 Cro. 256.

And as to that Matter they held, that the aforesaid Statute was not made in Favour of the Dissenters, but the contrary, and was rather to exclude them from beneficial Offices, than to ease them from Offices of Charge, &c. so that this Case is not within the Meaning of that Statute.

But that which they principally relied on was, That the Defendant should not be allowed to disable himself to avoid an Office, no more than a Man could be allowed to say, that he was an Idiot, or non Compos, and so to avoid an Act done by himself; besides, great Inconveniences may happen to the Government, if this should be allowed.

Justice Sam. Eyre contra in omnibus, and cited the Case of the * Mayor of Guilford in Point, and directed Case between Box and Woolaston, Anno 1693.

See Sir John Read's Case, the like Judgment as in the principal Case, and it hath been * adjudged, that a Refusal of Oaths enjoined to be taken by the Statute amounts to a Refusal of the Office, so as by the Statute he may be fined as for refusing the Office.

Olinere versus Sheafe. In C. B. Trin. 5 W. & M. Rot. 1487. but adjudged this Term.

IN Replevin, &c. The Defendant made Cognizance to mine districkionis for a Rent charge, alleging that John Chapman granted a Rent Charge of 4s. 1. per Ann. unto Moraria Taylor, Spinster, and to her heirs, issuing out of the Place where, &c. with a Clause of Disceiss, &c. by her Dred (hic in coria prolat) in Consideration of the Love and Affection which she bore to her Kinsman Sir William Brodanex, covenanted to stand seised of the said Rent, to the Use of Sir William Brodanex and his Heirs, from and after her own Death, if she should die without Issue, living at or after her Death, and avers the Death of the said Moraria without Issue.

And farther, That the said Sir William Brodanex granted this Rent to Nath. Willmott, after whose Death (the Lands out of which, &c. being Gavelkind) the Rent descended to his four Sons A. B. C. D. and for a fourth Part of the said Rent happening to D. the youngest Son, and for his Share, the Defendant bene cognovit captionem, &c.

* Mayor of
Guilford
ver. Clerke:
1 Vent. 247,
248.
† 1 Mod. 199.
‡ 3 Lev. 116.

3 Lev. 116.
1 Lutw. 209.
Pleading in
Deed by a
way of Dis-
cussant for
good seised
Good. 221

D E

Term. Sanct. Trin.

6 Willi. & Mariæ, B. R.

Reev *versus* Long. Trin. 1. W. & M. B. R.
 Rot. 1050.

ERROR of a Judgment in C. B. in a special Verdict in Ejectment, wherein the Case appeared to be as followeth:

That John Long was seised in Fee of the Houses and Lands in Question, and had three Brothers all of them now dead, but each of them left Issue Male.

John Long, by his last Will, devised the Lands now in Question, to the eldest Son of his elder Brother for Life, and after his Death, then to his first, second, third, fourth and tenth Son in Tail Male successively; and for Want of such Issue unto the eldest Son of his next Brother for Life; Remainder in Tail to his Sons *ut supra*, the like to the eldest Son of his three Brothers, &c. in Tail Male.

Then John Long died, and the eldest Son of his elder Brother entered, and married, and died without Issue living at the Time of his Death; but left his Wife big with Child, which was afterwards a Son born, and his Mother as his Guardian, kept the Possession of the Lands, as in his Right, many Years, against whom the eldest Son of the second Brother brought an Ejectment.

And the sole Question was, Whether the Devise of this Estate to the first Son of the eldest Son of the Brother of the

3 Lev. 408.
 1 Salk. 227.
 4 Mod. 282.
 What shall
 be a contin-
 gent Re-
 mainder, and
 what an ex-
 ecutory De-
 vise.

See the 2d
 rule 10 B.
 12 W. 4. 1.
 the Law
 1020.

the Testator should be taken as an executory Devise, or otherwise by way of contingent Remainder, as it was adjudged in the Common Pleas; for it was agreed, That if this Devise to the first Son of the eldest Son of the Brother, was a contingent Remainder, then such Remainder was lost and destroyed, because the Contingency did not happen during the particular Estate; and so the Remainder never vested, which is Archer's Case, lib. 1. cap. 11. p. 11. But it was insisted, that this Will should be so expounded, that the Intention of the Testator might have its Effect, and his Intent is very plain, that the Sons of his second Brother should take nothing whilst any of the Issue Male of his elder Brother were living; and therefore this Devise must be executory.

Sed per Curiam, This is a contingent Remainder, and the Contingency not happening till after the particular Estate was determined, the Remainder is destroyed as in Archer's Case.

And 'tis a certain Rule, That a Will shall never operate by way of executory Devise, if it might take Effect by way of Remainder, (viz.) If there is a particular Estate sufficient to support it.

And Serjeant Pemberton, who argued for the Defendant in Error, laid it down for Law, that two Things are necessary to an executory Devise.

(1.) There must be a Limitation after, or upon a Fee precedent.

(2.) Such Limitation must be to take Effect upon a Condition precedent.

In both which Cases no Remainder can subsist, and therefore the Law for the sake of the Testator, and to perform his Intent, hath stretched it self to make it operate by way of executory Devise, ut res magis valeat.

Moreover he insisted, that if one Limitation of a Devise is taken to be executory, then all the subsequent Limitations must likewise be so taken; for the several Limitations of a Devise of one and the same Thing, shall never be made to operate several Ways, (viz.) Some by way of executory Devise, and others by way of Remainder; and in this Case, if all the Limitations should be taken by way of executory Devise, then it would plainly tend to a Perpetuity, which is so much abhorred by the Law.

Afterwards, upon a Writ of Error brought in the House of Lords, this Judgment was reversed.

The

See the Statute 10 & 11 Will. c. 16. the Law altered.

The Bishop of Excester versus Hele. Trin. 5
Will. & Mar. B. R. Rot. 134.

ERROR of a Judgment in the C. B. in a Quare Impedit brought by Sampson Hele Esq; against Jonathan Bishop of Excester and Gawen Hayman Clerke, wherein Hele declared, that he was seised in fee of the Manor of Southpool in Devonshire, to which the Advowson of the Church of Southpool was appendant; and that he had presented one Ultramere thereunto, who was admitted, instituted and inducted, and is now dead; whereupon the Church is void, and it belongs to him to present, &c.

3 Lev. 313.
4 Mod. 134.
2 Salk. 539.
Cases Adj 88.
2 Lutw. 1094.

Plea in a
Quare Impedit, not good.

The Bishop pleaded, that he claimed nothing but as Ordinary, but sets out farther, that this Church is a Benefice with Cure of Souls, and that it became void 15 April, Anno 2 Will. & Mar. by the Death of the said Ultramere, that on the 19th of May following, the Plaintiff presented one Francis Hodder as his Clerk, and that the said Hodder, Tempore presentationis illius fuit persona in literatura minus sufficiens seu capax ad habendum dictam Ecclesiam; upon which he (the Bishop) examined the said Hodder concerning his Ability; and upon Examination found him fore personam in literatura insufficien. & ea ratione personam inhabilem & minus idoneam ad habend. prædictum beneficium cum Cura Animarum, and therefore he (the Bishop) refused to admit the said Hodder.

That afterwards, (viz.) 20 Junii next following, he gave the Plaintiff Notice of this Matter, that he might present a new Clerk, but the Plaintiff presented no other, so that the Church was vacant more than six Months after the Decease of the said Ultramere; wherefore, after the six Months were passed, he (the Bishop) collated the other Defendant Hayman by Lapse.

Hayman, the Incumbent, pleaded the same Plea mutatis mutandis; the Plaintiff replied, that Hodder, at the Time of the said Presentation was, and yet is, Vicar of the Parish-Church of Ugborough in the said County, and that he was lawfully admitted, instituted and inducted thereunto, and that he is a Man in sacred Orders by Episcopal Ordination, and that he was a Preacher licensed and allowed by Anthony late Bishop of Exon, and had the
Cure

Cure of Souls for many Years, and that he was sufficiently qualified, as well to celebrate Divine Service as to administer the Holy Sacraments, &c.

There was a frivolous Resolinder, and the like Surrejoinder, thereupon the Defendant demurred; and Judgment was given for the Plaintiff in C. B.

The Points controverted were; First, Whether this Replication was material; and next, if the Defendant's Plea was good in Manner, as 'tis set forth.

As to the Replication it was insisted, that it was good by Way of Conclusion against the Defendant to say, that Hodder was minus sufficien. in literatura, because he was at that Time a Priest in Orders, and had a Cure of Souls; but this Point was not fully resolved; yet the Court inclined, that the Replication was ill, and that Hodder (tho' a Priest in Orders) was yet subject to an Examination of his Ability upon a new Promotion.

As to the Plea, two Objections were made to it.

1 Leon. 31,
32.
3 Cro. 119.
Albany's
Case.

(1.) That the Bishop was a Disturber by his own Shewing, for that it appeared by his Plea, that he gave no Notice to the Plaintiff until thirty-two Days after his Refusal of Hodder, wherefore this long Delay of Notice amounted to a Disturbance ipso facto, because the Bishop in such Cases is bound to give Notice to the Patron with all possible Speed; but the Court gave no Opinion in this Point.

2 Inst. 632.

(2.) The chief Objection to the Plea was, that the Matter thereof is very incertain, and so general, that no Issue could be taken; for 'tis not sufficient for the Bishop to say in general Terms, that Hodder was persona in literatura minus sufficien. but he ought to set forth in what particular Part of Learning he was insufficient, because there are several Sorts of Learning which are not necessary to qualify a Man to be a Divine; therefore the Bishop in such Cases ought to set forth the Cause of his Refusal to admit the Clerk of the rightful Patron; and this in a very particular Manner, that the Court may judge, whether the Cause is sufficient or not; and for this Reason the Judgment was affirmed; for both Courts were unanimous, that the Plea was ill for this Cause; and * Specer's Case was held to be an Authority in Point.

* 3 Rep. 57.

But the Bishop brought a Writ of Error in Parliament, and there the Judgment was reversed; all that was urged was, that Hodder did not understand the Latin Tongue; for upon the Bishop's Examination he could not translate the Number thirty-nine into Latin.

The King and Queen *versus* Bishop of London and Dr. Lancaster. Hill. 4 Will. & Mar. B. R. Rot. 964 and 965.

Quare Impedit to recover the Presentation to the Church of St. Martin in the Fields in the City of Westminster, upon an Avoidance by the Promotion of Dr. Tennison, the last Incumbent, to the Bishoprick of Lincoln.

3 Lev. 377.
4 Mod. 200.
Cases Adj.
164.

There is no Avoidance by Cession till the Bishop is consecrated.

The Declaration was, that Humphrey late Bishop of London was seized in Fee in Right of his Bishoprick, of the Advowson of the Vicarage of the Parish Church of St. Martin in the Fields, ut de uno grosso per se, and that the said Bishop collated Dr. Tho. Lamplugh to the said Vicarage, then void; who by Virtue of that Collation was put in the corporal Possession thereof; that afterwards the said Dr. Lamplugh was promoted to the Bishoprick of Excester, by Reason whereof the late King Car. 2. Ratione prerogativæ suæ, presented Dr. William Lloyd, who was afterwards made Bishop of St. Asaph, per quod the same King Car. 2. ratione prerogativæ suæ presented Dr. Tho. Tennison, who on such a Day, &c. was created Bishop of Lincoln, per quod the Vicarage vacavit per promotionem prædictæ Dr. Tennison, and that it belonged to the King and Queen to present ratione prerogativæ suæ, &c.

The Defendants appear and pray Oyer of the original Writ, which was entered in hæc verba, and it appeared to be a common and general Writ, shewing the King's Title no otherwise, but by the common Words Quæ vacat & ad nostram spectat donationem.

Quo lecto & audito, the Defendants plead in Abatement of the Writ and Count, because of the Variance between them in this Matter, (viz.) for that the King and Queen had entitled themselves in the Writ generally pleno jure, but in the Declaration they had set forth their Title to be ratione prerogativæ suæ.

To this Plea the Attorney General demurred, and upon Argument per Curiam, the Writ and Declaration are

S f

good,

good, for there is no special Writ in the Register in this Case, and therefore the Writ must be general, and the Declaration special; so the Judgment was, that the Defendants answer over.

Whereupon they pleaded in chief, and set forth the Title of the Bishop of London to the Abbowlson of the said Vicarage, in Right of his Bishoprick, and the Plenarty by Dr. Tennison; and that on such a Day Dr. Tennison was elected Bishop of Lincoln, and afterwards, on such a Day, was consecrated Bishop, &c. and that the said Dr. Tennison procured a Dispensation to hold the said Vicarage in Commendam untill such a Day, which happened to be six Months and three Days after his Consecration; that this Dispensation tenere in Commendam was confirmed by the King and Queen, and that Dr. Tennison held the said Vicarage in Commendam accordingly, (viz.) Six Months and three Days after his Consecration, &c. & hoc, &c.

The Attorney General likewise demurred to this Plea, and two Points were made:

II. (1.) Whether there is any such Privilege belonging to the Crown as to have the next Presentation, where the Avoidance of a Church is by Promotion of the Incumbent to be a Bishop.

And as to this Point, the Law being settled by many Authorities for many Years, the Court was not willing to have it stirred, tho' there were as many Authorities against such a Privilege; and therefore without Difficulty adjudged for the * Plaintiffs as to this Point.

* Broke Pre-
sentment al
Eglise, pl. 3, 14, 61. Moor 399. 2 Cro. 695. 3 Cro. 542. Cro. Car. 780. 2 Roll. Abr. 343.
Vaugh. 18. 4 Inst. 356.

(2.) The second Point was, if this Dispensation tenere in Commendam, being three Days longer than six Months, and the Confirmation thereof by the King and Queen amount to a Presentation by the King and Queen, and thereby their Turn to present ratione prerogativæ well served.

To which it was answered and resolved per Curiam, that this Confirmation or Dispensation by the King, &c. cannot operate two Ways, first to suspend their Title for six Months, and longer, and also to pass a Right out of them, (viz.) their Right of Presentation; for a Dispensation tenere in Commendam for six Months † suspends the Right of Presentation till that Time shall be expired.

† Hob. 143.
Vaugh. 26.

Moreover it was held and resolved, that the Church did not become void by the Election of the Incumbent to be a Bishop,

Bishop, but the Vacancy accrued by his * Consecration, * 41 Ed. 3.
and not till then. §. 6.

Judgment for the King and Queen to recover.

11 H. 4. 37.
Vaugh. 19.

Reynell *versus* Long & al'. Mich. 3 W. & M.
C. B. Rot. 347.

Quare Impedit by Edmond Reynell, Esq; against Richard Long and Thomas Long Clerks, for the recovering his Presentation to the Vicarage of Broadcliff in Devon.

Proferat hic in Curia where necessary, and where not.

It. The Plaintiff declared, that George Reynell his Great Grandfather was seised in Fee of the Advowson of the Vicarage of Broadcliff in gros, &c. and being so seised, granted the next Avoidance to Elizabeth Boroughs Widow, and she granted it over to one William Segar; and that the Church became void by the Death of Robert Stennings the last Incumbent; and thereupon the said William Segar presented one John Segar, who was admitted, &c.

And of a Variance between the Writ and Count.

And then George Reynell by Deed granted the said Advowson (inter alia) unto Arthur Champernoon and others, and to their Heirs to the Use of the said George for Life, and afterwards to the Use of Edmond Son and Heir of George, and the Heirs Males of his Body, begotten on the Body of Ursula his then Wife; and for Want of such Issue, to the Use of the Heirs Males of the Body of the said Edmond.

By Virtue of which Grant, and of the Statute for transferring Uses into Possession, the aforesaid George was seised of the said Advowson for his Life, Remainder to Edmond his Son in manner as aforesaid; and that afterwards George died, and Edmond his Son was seised in Tail, ut supra, &c.

That Edmond the Son of George had Issue by his Wife Ursula George Reynell his Son and Heir, Father of the Plaintiff; that during the Seisin of Edmond the Grandfather, the Church became again void, which happened in the Time of the Usurpation, (viz.) 1656. and thereupon within six Months after the Vacancy, one John Copelstone (at the Nomination of one George Reynell who had no Right) was put into actual Possession of the said Church, by the then Persons in Authority, who was afterwards by the Statute 12 Car. 2. (which he set forth) confirmed in the said Church for his Life.

S f 2

That

That afterwards Edmond the Grandfather died seised as aforesaid, and that George the Father was seised in Tail Male, and had Issue the Plaintiff his Son and Heir; and then George the Father died, and the Abbotsdon descended to the Plaintiff in Tail Male, and then the Church became void by the Death of Coplestone; whereupon it belonged to the Plaintiff to present to the said Church, but he was disturbed by the Defendants.

The Defendants demurred in Law, and shew for Cause of Demurrer, that the Plaintiff had not pleaded the aforesaid Grant of the Abbotsdon by George Reynell, &c. unto Champernoon with a Profer hic in Curia, and the Plaintiff joined in Demurrer.

And now two Objections were made by the Council of the Defendants.

(1.) That the Deed of Settlement supra, by which the Abbotsdon of the Alcarage is pretended to be entailed, ought to have been pleaded with profer hic in Curia, so as the Defendants might have Oyer of it; for here the Deed is necessary ex institutione legis to make it a good Grant, for without the Deed the Abbotsdon will not pass.

To which it was answered and so resolved, that the Plaintiff in this Case shall not be compelled to produce the Deed for the Reasons following:

(1.) First, Because the Deed doth not belong to him who is only Cestui que trust, but it belongs to the Grantees.

(2.) Because he hath no Remedy in Law to get Possession of the Deed.

(3.) He is in merely by Operation of Law, and not in the Per; and for Authorities the Cases in the * Margin were cited.

* Dyer 277.
2 Cro. 217.
Noy 135,
145.

W. Jones 377. Cro. Car. Stockton *versus* Hampton. 2 Roll. Abr. 31.

(2.) Objection, *sc.* There is a Variance between the Writ and the Count, for the Writ is quod permittunt eum presentare ad Vicariam Ecclesie de B. and the Conclusion of the Declaration is quod ad ipsum Edmundum ad Ecclesiam predictam sic vacantem, &c. pertinet presentare, &c.

So that the Writ is quod permittat, &c. presentare ad Vicariam, and the Declaration is ad Ecclesiam pertinet presentare.

* Hob. 327.
2 Cro. 515.

To which it was answered, and so resolved per Curiam, quod omnis Vicaria est Ecclesia, and 'tis so held expressly in several * Books; and therefore no Variance in Substance, but only in Form, and this was not Given for Cause of Demurrer.

* 3 Bulst.
88, 90.
1 Roll. Rep.
255, 257.

And the † Precedents are as in this Case; wherefore Judgment was given for the Plaintiff, and thereupon the Defendants brought a Writ of Error, and a Bill in Chancery, &c.

† Rast. Ent.
522.
Co. Ent. 491,
b. 509.

The King and Queen *versus* Tucker. *Judgment was given in* Easter-Term, 6 Willi.

THE Defendant was indicted for High Treason before Special Commissioners of Oyer and Terminer by Letters Patent of Jac. 2. at their Sessions held at Wells in the County of Somerset, 21 Day of March, ann. 3 Jac. 2. and the Substance of the Indictment was for his being in actual Rebellion against King James, in assisting the late Duke of Monmouth in the Insurrection in the West.

4 Mod. 162.
Cases Adj.
126.
Salk. 630.
3 Lev. 396.
Indictment
of High
Treason
must con-
clude *contra*
Ligantia sue
debitum.

This Tucker amongst several others confessed the Indictment, and thereupon Judgment of Death (as in Cases of High Treason) was pronounced against him, and then he was pardoned.

Afterwards Anno 2 & 3 Will. & Ma. he procured Leave to bring a Writ of Error on the Judgment of his Attainder; and hereupon several Errors were assigned.

(1.) That the Direction of the Letters Patent of Oyer and Terminer was ill, for that it was coram A. B. C. D. Justiciariis, &c. per literas patentes ipsius Domini Regis sub magno sigillo Angliæ confect' eisdem A. B. C. D. & al' aliquibus tribus vel plur' eorum direct'.

Sed per Curiam, This is well enough, and in the Earl of * Leicester's Case, the Direction was in the same Manner, tho' it was objected, that the Direction ought to have been to all of them, and then the Authority afterwards given to any three of them.

* Plowd.
384.

(2.) That upon the Arraignment of Tucker, and others upon the same Indictment, the Entry is (after the Prisoners were brought to the Bar) & statim de præmissis in indictmento præd' specificatis eis imposit' per Curiam hic allocat' qualiter se velle acquietari, &c. separatim dicunt, &c.

whereas

whereas it ought to have been separatim allocut', for they ought to have been arraigned severally.

Sed non allocatur; for it shall be expounded severally, and so are many Precedents.

(3.) That Judgment was given upon the Confession without any Prayer made by the King's Counsel in Behalf of the King.

Sed non allocatur; for such Prayer is not of Necessity.

(4.) For that the Judgment is erroneous, it being quod ad locum executionis trahantur, but not said * super hurdellum trahantur, & super furcas ibidem per collum suspendantur & uterque eorum suspendetur, omitting per Collum suspendetur; that the Clause quod secreta membra sua amputentur was wholly left out of the Judgment, which is a necessary Part thereof; and that it was quod corpora eorum & utriusque eorum in quatuor partes dividantur, but did not say, & corpus utriusq; eorum in quatuor partes dividatur.

* 3 Inst. 210,
211.
Co. Ent.
361. b.
Plowd. 387,
351.
Staunf. 182.
Tit. Judgment 19.

But per Curiam, all these Exceptions were over-ruled upon View of several Precedents, both ancient and modern, wherein Judgments had been defective in these Particulars, (viz.) many in every Point, and many in some, and not in others, from the Time of H. 8. to this present Time.

(5.) Objection to the Judgment was, That it was not said quod interiora, &c. in ignem ponantur, which Clause was wholly omitted.

Sed per Curiam, upon View of Precedents, that Objection was likewise over-ruled.

Calvin's
Case.
7 Rep.
Dyer 155.
1 Inst. 129.
3 Inst. 11.

(6.) At last there was an Error assigned in the very Indictment, because it did not conclude contra ligeantiae suae debitum, neither was it said to be contra ligeantiae suae debitum in any Part of the Indictment.

To which it was answered, that there were Words in the Indictment which did amount to that Clause; for it was said, that they on such a Day contra dominum Regem supremum verum naturalem & indubitat' dominum suum, with a Multitude of Persons to the Number of four Thousand, had assembled with Drums, Colours, &c. in open War, &c. all which was apparently against their Allegiance.

But after many Arguments, per Curiam, the Judgment was reversed for this Error only; which Judgment of Reversal was afterwards affirmed in Parliament; & per Curiam,

am, 'tis an Essential to an Indictment of High Treason, that the Fact should be laid to be done contra Ligeantiae suae debitum; and most properly in the Conclusion thereof: Sed per Holt Ch. Justice, It would be sufficient, if it had been in the Body of the Indictment; but it must of necessity be somewhere, unless in Cases of Treason, made so by any new Act of Parliament, where such a Conclusion is not necessary.

And it was held, that the Word Proditorie is as essential in an Indictment for High Treason, as the Words Felonice and Burglariter in Indictments for Felony or Burglary.

But lastly, The Attainders of Sir Henry Vane and General Lambert were produced, and there the Clause contra Ligeantiae suae debitum was omitted, as here.

Nota; This Reversal was strongly opposed by Mr. Hall, afterwards Serjeant Hall, of the Middle Temple, who had purchased under this Attainder.

Philips *versus* Bury.

THIS was a Controversy between the Bishop of Exon. and Dr. Bury, Rector of Exeter College in Oxford, concerning the Bishop's Right of Visitation of that College, and the Depriuation of the Doctor by the Bishop as Visitor, &c. and after a Special Verdict in Eschequer brought by one Painter against Dr. Bury, who was chosen Rector upon the Depriuation of the Doctor; Judgment was given in B. R. for the Doctor; and the Suit being by Original and not by Bill, a Writ of Error was brought on this Judgment in Parliament, and there it was reversed; and the Record of the Reversal remitted into the Court of King's Bench.

And it was moved in Behalf of the Plaintiff (Painter) that the Court of B. R. would give a new Judgment, (viz.) Quod querens recuperet, &c. and for this the Case of *Faldo versus Ridge* was cited; and it was insisted, that there would be a Failure of Justice, unless this Court would do so, because the House of Lords had only a Transcript of the Record, and no Rolls to enter any Judgments.

Sed per Curiam, A new Judgment cannot be given by the Court contrary to that which had been already given; but that the same Court which reversed the Judgment

Upon a Reversal of a Judgment of B. R. in Parliament, that Court must give a new Judgment.

* Yelv. 75.
2 Cro. 106.
2 Roll. Abr. 774.

ment must give a new Judgment for him in whose favour it was reversed.

'Tis true, in the Case of Faldo and Ridge *supra*, the Court of Exchequer-Chamber, after the Reversal, &c. gave Judgment quod querens recuperet; but because they wanted Power to award a Writ of Inquiry, which was necessary in that Case, the Judgment being on a Demurrer, therefore it was sent back into the King's Bench for the Execution of that Writ, and thereupon to give the final Judgment.

* Dyer 343,
373.
4 Inst. 72.
F.N.B. 19.D.
Yelv. 118,
119.
2 Saund. 234,
256.

But 'tis otherwise where the Judgment is against the Plaintiff in B. R. upon a special Verdict, and that Judgment reversed in the Exchequer-Chamber, for in that Case (no Writ of Inquiry being requisite) that Court doth, besides the Judgment of Reversal, give a compleat Judgment for the Plaintiff in the Action, (*viz.*) quod recuperet; and to prove this Diversity, the Cases in the * Margin were cited.

And hereupon the Court of B. R. were of Opinion they could not give a new Judgment in this Case, and therefore the Plaintiff resorted back again to the Parliament; and there upon Debate a new Judgment was given, quod querens recuperet, which was entered accordingly, and executed.

The King *versus* Haines, Alderman of Gloucester.

Where the Defendant shall be compelled to plead *instante*.

* 25 Car. 2. cap. 2.

AN Information was exhibited against the Defendant for executing the Office of Alderman and Justice of Peace, not having taken the Oaths within three Months, according to the * Statute; and he appearing, it was moved, that he might be compelled to plead *instante*, but he insisted to have an *Impar lance*.

Sed per Curiam, upon Debate it was agreed by them and the Master of the Crown-Office, that if Process of Subpoena issue out of that Office, and the Party is returned summoned, and doth not appear at the Return of the Process, and thereupon an Attachment issueth, and Non est inventus returned; upon which a Capias goes out, and the Party is taken thereon; or if he came in voluntarily at any Time after the Capias is gone out; in such Case he shall plead *instante* without any *Impar lance*.

And this was the Defendant's Case, for he came in voluntarily after the Capias was gone forth, wherefore he was ordered to plead instanter.

But then he insisted, that there was no Information filed against him at the Time of the Return of the first Process, (viz.) Of the Subpoena, and therefore all the subsequent Processes against him are irregular, to which the Court agreed, if the fact was so.

Therefore it was referred to the Master of the Office to examine that Matter; and this Information being afterwards (Trin. 7 Willi.) tried at the Bar, the Defendant was acquitted.

Nota; It was agreed per Curiam, that if the Party is brought in by a Judge's Warrant, without any Process against him, in such Case he shall have an Impar lance, and not be compelled to plead instanter.

Lawson *versus* Story.

SIR Wilfred Lawson, after the new Statute concerning Distresses, made Anno Will. & Mar. distrained his Tenant Story for Rent in arrear, who rescued the Distress, whereupon Sir Wilfred (according to the Directions of that Statute) brought an Action on the Case against the Rescuer, and had a Verdict and treble Damages; and now the Question was, Whether the Plaintiff's Costs, as well those given by the Court de incremento, as those given by the Jury, should be trebled, as well as the Damages, the Words of the Statute being, that the Plaintiff shall recover treble Damages and Costs; and the Question was, Whether the Word Treble shall extend to the Costs as well as to the Damages, or whether it shall relate to the Damages only; and after several Debates it was resolved per Curiam, that the Costs given by the Court and Jury should be trebled as well as the Damages; and that it was so ruled by this Court in the Case of Sands and Child, ^{See Dyer 159. b.} where the Action was brought against Sir Josiah Child, for suing in the Court of Admiralty concerning Matters, of which that Court had no Jurisdiction, upon the * Statutes * Ric. 3. which give double Damages, without mentioning Costs; ^{2 H. 4. c. 11.} yet Sands had double Costs.

Where the Costs shall be treble as well as the Damages.

St. Leger *versus* Pope. Trin. 6 Will. & Mar.
B. R. Rot. 556.

1 Lutw. 484.
4 Mod. 406,
410.
5 Mod. 4.
1 Salk. 344,
484, 487.
Variance be-
tween a spe-
cial Agree-
ment and the
Declaration.

DEBT in the Debet and Detinet for 107 l. 10 s. the Declaration was upon a special Wager for 100 Guineas (which the Plaintiff averred were worth 107 l. 10 s.) concerning a Game at Tables, where a Question arose, whether he who only toucheth his Table-man, ought to remove him; and the Decision of this Question was, by Agreement in Writing, referred by the Parties to the Groom-Porter, who determined it for the Plaintiff in the Action, (viz.) That he who only toucheth a Man is not bound to remove him; and the Plaintiff concluded his Declaration, that the Defendant licet sapius requisit. had not paid the 107 l. 10 s.

The Plaintiff had Judgment in the Common Pleas; and now upon a Writ of Error brought, three Things were insisted on:

(1.) That this Action ought to be brought in the Detinet only for the 100 Guineas in Specie, and not in the Debet and Detinet.

Sed non allocatur; for 'tis well enough in the Debet and Detinet.

Yelv. 136.
Rast. Ent.
158. b.
Hardres 320.

(2.) That the Plaintiff ought to have concluded his Declaration in the Disjunctive, (viz.) That the Defendant had not paid the 100 Guineas, or the 107 l. 10 s. because he had Liberty to pay either the one or the other.

(3.) That the Plaintiff had demanded more than the Guineas for which they were coined, and the Court will ex Officio take Notice of the English Coins; now a Guinea was first coined for 20 s. and no more, and is current and legal Coin for no more than 20 s.

The Court doubted as to these Two last Exceptions, but especially concerning the second Exception, which they inclined to think a fatal Fault.

But afterwards the Judgment was reversed for another Fault in the Declaration.

For per Holt Ch. Justice, There is a Variance between the Declaration and the special Agreement in Writing; so that the other Points were not adjudged.

Now the Variance was, for that the Plaintiff had declared, that the Defendant per scripte sigillo suo sigillat, had bound himself in the Wager; but there was no such thing in the Writing or Note, for that was only to stand to the Judgment of the Groom-Porter upon a Case stated and signed by the Parties.

Martin *versus* Wilsford. *In the Exchequer*; Intratur there Trin. 6. adjudged Term. Pasch. Anno 8 Willi.

MARTIN brought an Action of Trespass in the Court of Exchequer against Wilsford and one Nicholls, and laid his Action in Devon, and declared, that the Defendants at Tavistock in the County of Devon, 5 April, Anno 6 W. & Mar. had taken and carried away two Pieces of Cloth, called Kersies, of him the Plaintiff, to the Value of Thirty Pounds, and had converted them to his own Use.

After Judgment upon an Information, for a Seizure of Goods forfeited, the Property of such Goods is devested from the right Owner.

The Defendant pleaded in Bar, that the two Pieces of Cloth in the Bill mentioned, being Goods and Merchandise for which a Subsidy was due to the King and Queen, were between the first of Octob. 5 W. & M. and the 30th of August then next following, exposed to Sale at Ratcliff in the County of Middlesex, before they were sealed with the Seal of the Collector of the said Subsidy, according to the true Intent of a certain Act of Parliament in that Part made and provided against the Form of the same Statute; by reason whereof he the said Wilsford, then and yet being one of the Deputy Aulnagers and Collectors of the Subsidy of Woollen Cloth, vendible in the several Counties of Devon and Cornwall, lawfully constituted and authorized, did according to the Duty of his Office, and the Defendant Nicholls as his Servant, and by his Command, between the said first Day of October, Anno 5. and the said 30th of August following, at Ratcliff in the County of Middlesex, within the Port of London, bona prædicta ob causas prædictas seisciverunt & ad opus dictorum Domini Regis & Dominae Reginae tanquam forisfacta arrestaverunt; and the said Wilsford tunc Officiarius prædictus ut prefertur existen' afterwards, (viz.) the same 30 August, by the Name of Thomas Wilsford gen', one of the Deputy Aulnagers and Collectors of the Subsidy of Woollen Cloth, vendible in

the several Countie of Devon and Cornwall, qui pro eisdem Dom' Rege & Domina Regina sequebatur dedit Curia huius scaccarii intelligi & informari, that he between the 1st of Octob. ann. 5. and the 20th of Aug. next following, at Ratcliff in the County of Middlesex, had seized and arrested to the King and Queen's Use as forfeited, two Pieces of Cloathen Cloth called Kersies, de bonis & catallis personæ ignora, for that the said two Pieces of Cloth being made and brought to sell and utter, for which Subsidy was due, were, within the Time aforesaid at Ratcliff aforesaid in the County of Middlesex, exposed to Sale before they had been sealed with the Seal of the Collector of the Subsidy aforesaid, contra formam statuti in ea parte editi & provis. & peti advisamentum Curia, &c. and that the Cloth might remain forfeited according to the Form of the Statute aforesaid.

Et superinde taliter processum fuit, &c. that afterwards, (viz.) 23 Octob. ann. 6. it was adjudged by the Barons of the Exchequer, that the Goods aforesaid for the Cause aforesaid should remain forfeited, and that Wilsford should be charged with, and satisfy to the King and Queen 20 l. being the Value of the said Goods, prout per Record' inde plenius apparet.

And that he the said Wilsford afterwards, (viz.) 8 Nov. Anno 6 Willi. paid the said Twenty Pounds into the Exchequer, prout patet per Record' prædict' per quod the said Wilsford, and the said Nicholls as his Servant, &c. upon the Day last mentioned, at Ratcliff aforesaid in the said County of Middlesex, prædict' duas pecias panni lanei in informatione & iudicio prædict' existen' duas pecias panni lanei in Billa ipsius (the Plaintiff) superius mentionat' in usum ipsius Tho. Wilsford converterunt & disposerunt prout eis bene licuit quæ sunt eadem captio asportatio conversio & dispositio prædict' duarum peciarum panni lanei unde (the Plaintiff) superius se modo queritur & hoc, &c.

To this the Plaintiff reply'd. Protestando non cognoscendo aliqua, &c. pro placito dicit quod prædict' duæ peciæ panni lanei in Billa ipsius (the Plaintiff) superius mentionat' non exposit' fuerunt venditioni antequam sigillat' fuerunt sigillo collectoris subsid' prædict' modo & forma prout & hoc petit quod inquiratur per patriam, &c.

And upon a general Demurrer to this Replication, it was insisted, that it was naught, for that the Validity of the Seizure (after it appears on Record, that the Goods were condemned) cannot be put in Issue; but that the Plaintiff in this Action was concluded as to that Matter by the Judgment and Condemnation upon the Information; for he had Time to have appeared and pleaded to the Information; and upon Issue joined the Legality of the Seizure might have been tried, (viz.) Whether the Cloth was exposed to Sale, or not, before it was sealed; but he having lost that Opportunity, he is now foreclosed from trying the Merits.

Besides it hath been always held, that after Judgment upon an Information for a Seizure of Goods for the King, the Property of those Goods are altered thereby, so as neither Trover or Trespass will lie for him who was the Owner; and 'tis not reasonable that a Judgment should be subverted by a collateral Action.

To which all the Barons agreed, and declared it to be the standing Rule of the Court.

But then it was insisted for the Plaintiff, That the Plea was ill, for the Reasons following:

(1.) For that by the * Statute, which gives the Forfeiture of the Cloths exposed to Sale before they are sealed with the Seal of the Collector of the Subsidies, 'tis appointed, that such forfeited Cloths shall be seized for the King, by the Collector or Aulneger, or by the Deputy of one of them, or else by the Bailiffs of the Town where the Cloths were exposed to Sale; so that no other Person hath Power to seize, but those named in this Statute.

And it appears by the Plea, that the Defendant Willford was only a Deputy Aulneger and Collector for Cloths vendible in the Counties of Devon and Cornwall; and by Consequence had no Power to seize elsewhere out of those two Counties; and yet by his own Shewing it appears, that he seized, &c. at Ratcliff in the County of Middlesex, which was out of his Deputation, and where he had no manner of Power.

The same Matter likewise appeared in the Body of the Information pleaded; so the Judgment therein was ipso facto void, because the Information was *felo de se* shewing that the very Informer had no Power to seize, and then by Consequence the Court could not condemn Goods

Hardr. 194,
195.
Raym. 336

Extra for
the Plain-
tiff.

* 27 Ed. 3.
cap. 4.

Hardr. 18, 17

Goods upon a Seizure which appeared on Record to be void and illegal.

(2.) The Plea is likewise ill for another Reason, (viz.) because it was at large without Respect to the Time or Place laid in the Declaration, and this being a transitory Action, the Defendant by his Plea ought to have followed the Plaintiff both in Time and Place, since his Justification was not local, or at least he ought to have added a Traverse, (viz.) Absque hoc, that he was guilty aliter vel alio modo, &c.

So that the Plaintiff might have an Opportunity of taking Issue upon such Traverse, and so to maintain his Declaration.

(3.) The Plaintiff hath laid the Conversion, &c. to the Use of both the Defendants; and they have confessed a Conversion, but to the Use of one of them alone, which doth not meet with the Plaintiff's Declaration.

The Court gave their Opinions seriatim.

Curia.

ff. Powes, Torton and Ward Ch. Baron, that the Plea was ill for the first two Reasons supra, for they held that no Person hath Authority to seize the Cloth forfeited by the Statute 27 Ed. 3. aforesaid, but only those very Officers expressed in that Statute; and it appears, that the Defendant had no Authority to seize at Ratcliff, for by his own shewing, his Deputation extended only to Devonshire and Cornwall.

Where a Traverse is necessary.

They also held, that the Defendants in this Case ought to have added a Traverse to their Plea, (viz.) Absque hoc, that they were guilty aliter vel alio modo.

And the Chief Baron Ward added, that it was a certain Rule in Pleading, that where the Action is Transitory, the Defendant in his Plea must follow the Plaintiff, unless his Justification is local, and then he must traverse, absque hoc, that he is guilty extra.

But in this Case the Action is Transitory, and the Justification is not local, and yet the Defendant hath neither followed the Plaintiff, nor added any Traverse, wherefore the Plaintiff remains unanswered.

Now if the Defendant had pleaded well, he should have set forth, that he seized the Cloth at Tavistock upon the Day mentioned in the Declaration; and thereupon he informed this Court as upon a Seizure at Ratcliff, with the necessary Averments, that all was the same, and then have

ad.

added a Traverse, absq; hoc, that he was guilty aliter vel alio modo, which would have been sufficient without adding vel alio tempore.

And so it was adjudged in a Case of a Seizure made at Salisbury, and thereupon an * Information and Condemnation, as upon a Seizure in Middlesex; and in an Action of Trespass the Matter was pleaded specially, with the like Traverse, ut supra.

* Hill. 29,
30 Car. 2.
Smith v. Smith
Eking.

And the like special Justification and Judgment in another Case between Cole and Powell; and he said he could not find any Precedent in this Court to warrant such a Form of Pleading as in the principal Case; and farther, that in those collateral Actions, after a Condemnation upon a Seizure, the Rule is, (viz.) If the Action is Trover, the Condemnation may be given in Evidence upon the general Issue, because thereby the Property is divested out of the Party; but if the Action is Trespass, then the Matter may be specially pleaded; and tho', if well pleaded, it might have been a good Bar to the Action, yet now 'tis ill pleaded, the Court cannot take any Notice of the Matter it self, but must give Judgment upon the Insufficiency of the Pleading.

Lastly, Where a Statute makes a Forfeiture, and gives Power to seize generally, without naming any Persons who shall seize, in such Case any Person, tho' he is no Officer, may seize for the King; but here the Statute names the Persons by their Offices, who shall seize for him upon this Forfeiture; and tho' there are no negative Words, (viz.) That no other Person shall seize, yet in this Case expressum facit cessare tacitum, and the Negative is implied by the express Affirmative.

But Baron Letchmere was of Opinion for the Defendants for no other Reason, but because a Condemnation did appear on Record, and the Defendant charged with the Value, and therefore no Action will lie by the first Proprietor after such Condemnation, and the Defendant being an Officer, ought to be favoured in Matters concerning his Office; and in this Plea 'tis said, that the Cloth in the Declaration and in the Information are the same, and that is sufficient; but he could not cite any Precedent of the Court for such Sort of Pleading.

The Plaintiff had Judgment by the Opinion of three Barons.

Pullen

Pullen *versus* Palmer. Intratur Trin. 6 Will. & Mar. B. R. Rot. 179; but depended until Trin. 8 Will.

3 Mod. 71.
One Jointenant cannot
avow for
Rent, nor
maintain an
Action of
Debt for
Rent.

In Replevin, &c. the Defendant began his Avowry in this Manner:

ff. Et prædictus Samuel per T. S. Attorn. suum venit & defend. vim & injuriam quando, &c. & bene advocat captionem Averiorum præd. in præd. loco in quo, &c. & juste, &c. quia dicit quod, &c. and then sets forth, that A. was seised in Fee of such Lands, unde, &c. out of which he granted a Rent-charge of 6 l. per Annum unto B. C. D. E. with a Clause of Distress (being thirteen Persons in all) and unto their Heirs and Assigns for ever, for the Use of the Poor of the Parishes of Beckington and Rhode in Wilts, and this Grant was 6 Feb. Anno 20 Eliz.

Then he sets forth several Assignments of this Rent to new Trustees, &c. whereof the last was dated 20 April, 3 Car. 2. which was to the Defendant Palmer and twelve other Persons, and to their Heirs, for the Use of the Poor, &c. ut supra, then he shews that four of the last Assignees were dead, and that he and nine of the rest, (viz.) A. B. C. D. &c. survived, and then makes his Conclusion.

ff. Et quia 7 l. & 10 s. de redditu prædict. pro uno Anno & un. quarter. unius Anni finiti ad festum, &c. Anno, &c. eodem tempore quo, &c. præfat. Samueli & prædict. A. B. C. D. (naming the other Eight surviving Trustees) aretro fuerunt & insolut. idem Samuel bene advocat captionem averiorum prædict. in prædicto loco in quo, &c. & juste, &c. ut in tenementis distriction. (of him and the other surviving Trustees) in forma prædicta onerat. & obligat. &c.

The Plaintiff pleaded in Bar, that Puis darrein Continuance, one of the other Eight surviving Trustees had released to the Plaintiff all Actions and Suits depending concerning the Rent aforesaid, between the Plaintiff and the Defendant.

And upon a Demurrer by the Defendant, it was argued for the Plaintiff, that the Avowry was ill, both in Substance and Form.

As to the Form, it was objected, that the Conclusion of the Avowry was ill, because 'tis said, that so much Rent was behind, but did not expressly avow the Distress to be taken

taken for that Rent, but avowed generally, without shewing the Cause for what; whereas after (*bene advocat. captionem*) he ought to have added this Clause *pro prædictis 7 l. 10 s. de redditu præd. sic ut præfertur a retro existen. &c.*

Sed non allocatur; because 'tis said & quia such Rent was behind, he avowed, &c. so that the Word quia shews the Cause of the Distress.

But the chief Objection was as to the Matter in Law, for that the Defendant being Jointenant of this Rent, cannot avow alone, without making himself Bailiff to his Companions; and therefore in this Case he should, both in the Commencement and in the Conclusion, have avowed in *jure suo proprio*, and also made Conusance, *ut Bailivus*, to the rest of his Companions, because Jointenants cannot sever in an Avowry for Rent, either for Part or for the Whole arrear.

3 Brownl.
Entr. 339,
340.
Rast. Ent.
365. 4.
1 Brownl.
Ent. 17, 18.
Old. Ent. 94,
95.
1 Roll. Abr.
320.

On the other Side it was argued, this Omission was but Form, since the Defendant had by his Avowry expressly alledged, that the Rent for which he distrained was due to all the Jointenants, and avows the Taking, &c. as in Lands subject to the Distress of all of them, which amounts to as much as if he made an express Conusance as Bailiff to them; and farther, that one Jointenant may distrain for the whole Rent.

Econtra.

Sed per Curiam, The Avowry is ill upon the second Objection; for tho' one Jointenant may distrain for the whole Rent, yet he cannot avow for the Whole; for an Avowry is in Nature of an Action, and is a Demand in Law of the Rent.

And one Jointenant cannot maintain an Action of Debt for Rent without his Companion; and therefore in this Avowry, which is the same with an Action, he ought to make himself Bailiff to his Companions, so as they may be party to the Suit, and be entitled to their Shares upon his Recovery thereof, in their Right; and his Alledging, that the Rent was due to all, doth not mend the Matter, but rather makes it worse, for thereupon the Objection doth arise.

And the Defendant perceiving the Opinion of the Court, desired the whole Matter might be referred to Justice Eyre, because it concerned a Charity, which was done accordingly.

D E

Term. Sanct. Mich.

6 Willi. & Mariæ in B. R.

Cook *versus* Tucker.Words,
where ac-
tionable.

Action on the Case for scandalous Words spoken of the Plaintiff, late Mayor of Exon. setting forth, that he was a Merchant, and that the Defendant having Communication of him and his Trade and Family, said, he, (the Plaintiff) is a pitiful Fellow, and not able to pay his Debts, &c.

After a Verdict for the Plaintiff, it was moved in Arrest of Judgment, that these Words are not actionable, and for an Authority, the Case in the * Margin was cited.

Sed per Curiam, The Words, as they are laid, are actionable; and a Case was remembered between Garrett and Shelfon, Anno 36 Car. 2. where the Words following were spoken of a Weaver concerning his Trade, (*viz.*) He is a pitiful idle Rascal, and not worth a Groat, and held actionable.

Wilson *versus* Law. Pasch. 6 W. & M. B. R.
Rot. 22.

John Law a Scot, Gent. was indicted for the Murder of Edward Wilson in a Duell in Bloomsbury Square, upon which Indictment, he the said Law was tried at the Old-Baily, and convicted of Murder, and had Judgment of Death, but was reprieved.

Thereupon Robert Wilson, the Brother of the Person killed, and who was his heir, sued forth an original Writ of Appeal for Murder directed to the Sheriff of Middlesex, in whose Custody Mr. Law remained, (viz.) in Newgate-Goal returnable in Easter-Term, ann. 6 W. & M. in R. R.

And then moved for an Habeas Corpus to the same Sheriff, commanding him to bring up the Body of Law on such a Day certain, which was quarto die post the Return of the Writ of Appeal; and upon that Day the Sheriff was called in Court to make his Return.

Thereupon the Sheriff brought up the Body of Law in Custody, and returned the Habeas Corpus, shewing the Causes of his Imprisonment, (viz.) The Warrant of Commitment by the Justice of Peace, and also his Conviction and Attainder of Murder; and farther, that by Virtue of the Writ of Appeal, he had attached his Body, which Writ he thus returned; *ff. Virtute istius brevis mihi direct' attachiari feci infranominat' Johannem Law per corpus suum cujus quidem corpus ad diem infracontent' coram Domino Rege & Domina Regina ubicunque, &c. paratum habeo prout interius mihi præcipitur.*

Then Law was brought to the Bar, and arraigned, and the Plaintiff in Appeal counted against him; then his Counsel prayed Oyer of the Writ of Appeal, and the Return thereof, which being granted, two Days Time was desired for him to consider what to plead, which was likewise granted, but then he was to plead tunc pro nunc.

And Law being committed to the Marshal of B. R. was on that Day brought by him to the Bar; a Demurrer was put in for him in this form, (viz.) *Quibus lectis & auditis prædict' Johannes Law defend' vim & injuriam quando, &c. & omnem feloniam & quicquid, &c. & petit judicium de brevi originale & narratione prædict' quia dicit quod breve illud & Return' inde necnon narratio prædict' super-*

Co. Ent. 98.
See such a
Plea and
Demurrer.

inde minus sufficien' in lege existunt ad compellend' eundem Johannem Law ad inde respondend' quodque ipse ad breve prædict' sic ut præfertur retornat' seu ad narrationem prædictam sic ut præfertur declarat' necesse non habet nec per legem terræ tenetur respondere & hoc, &c. unde petit iudicium de brevi retorn' & narratione prædict' & quod breve ill' cassetur, &c. & quoad feloniam & murdrum prædict' idem Johannes Law dicit quod ille non est inde culpabilis & de bono & malo ponit se super patriam & prædict' Robertus Wilson similiter, &c.

It seems
not necessary
to plead
over to the
felony.

The Plaintiff in the Appeal joined in this form.

¶ Et prædict' Robertus Wilson quoad prædict' placitum prædicti Johannis Law superius ad breve ipsius Rob'ti Wilson prædict' in forma prædict' placitat' dicit quod breve illud ac Retorn' inde ac materia in eisdem content' bona & sufficien' in lege existunt ad prædictum Johannem Law ad inde respondere compellend' & hoc parat est verificare unde ex quo dictus Johannes Law nichil allegavit aut assignavit in quo breve illud sive Retorn' ejusdem malum vitiosum sive defectiv' existit idem Robertus Wilson petit iudicium & quod idem breve suum & dict' Retorn' ejusdem bona & sufficien' in lege adjudicentur & quoad dict' morationem in lege sive placitum prædict' Johannis Law ad narration' ipsius Roberti Wilson superius in forma prædicta placitat' **the Plaintiff joined in Demurrer in the common form.**

And now the Counsel for the Defendant Law made several Objections following :

4 Rep. 40.
Young's Case.

(1.) **That in the Declaration, the Wound was uncertainly described, (viz.)** In & super superiorem partem ventris ipsius Edwardi Wilson juxta pectus & medium Corporis ejusdem Edwardi ad tunc & ibidem felonice, &c. percussit pupugit & inforavit.

To which it was answered, that the Description of the Wound was as certain as the Nature of the Place where it was given could possibly bear; and Young's Case was allowed to be good Law, but it differed from this Case.

(2.) **The Word Dans in the Declaration was uncertain, (viz.)** percussit pupugit & inforavit Dans eidem Edwardo Wilson ad tunc & ibidem cum gladio prædicto in & super, &c. unum vulnus mortale which ought to be positively alledged by the Word Dedit, and not participly by the Word Dans.

To which it was answered, that the Participle Dans was more certain than Dedit, for being a Participle, it depends upon all the foregoing Matter.

(3.) The next Objection to the Declaration was, That the Fact was laid to be done circa horam primam post meridiem, and for that * Egerton's Case, and the Statute of Gloucester were cited.

* 1 Buft. 78.
Stat. Glouc.
cap. 9.

To which it was answered, That the Manner of declaring the Time by the Word circa is warranted by many Precedents.

2 Inst. 318.

(4.) The next Objection to the Declaration was, That the Fact was laid to be done apud parochiam Sancti Egidii in Campis, which is no legal Visne in this Case, the Matter being laid in a County at large, and not in a City (which makes the Diversity) for the Statute of Gloucester is, that the Vill, and not the Parish shall be set out.

2 Inst. 319.
Staundf. 80.

To which it was answered, That the Laying the Fact to be done apud parochiam is good, because by Intendment of Law, every † Parish is a Vill, unless 'tis shewn to the contrary.

† 1 Inst. 125

'Tis true the Statute of * Additions says, the Town, Hamlet or Place where the Party dwells shall be added, but in 5 Ed. 4. 28 & 128. and † 22 H. 6. 41. the Addition was de parochia, and upon an Objection to it, ruled good, which is an Authority in Point.

* 1 H. 5. c. 5.

But admitting the Parish of St. Giles did contain more Villis than one, then the Defendant might have pleaded, that Matter in Abatement, but the Course in all Indictments is to lay the Fact apud parochiam.

† Upon perusal of the Book 22 H. 6. I find the Opinion there contrary, for the Writ was abated.

(5.) The fifth Objection was to the Return of the Writ, first that it was attachiari feci infranominat' Johan' Law per Corpus, &c. Whereas it ought to be attachiari or cepi Corpus, because the Command of the Writ is Personal, (viz.) quod attachias, and not attachiari facias, and every Return must answer the Command of the Writ, so the Return of every Capias is Cepi, and not Capi feci, and the Words attachias per Corpus are in Effect the same with Capias Corpus.

Co. Ent. 56,
57.
Dyer 199. a.

Besides, it doth not appear to be done by any Bailiff of a Liberty, for then it ought to be Mandavi Ballivo, &c. and if done by a Bailiff Errant, then it ought to be returned as done by the Sheriff in Person, as in Case of the Capias supra; but here for ought appears to the contrary, the Writ was attached without any Authority.

Kitch. 258.

To which it was answered, That Attachiari feci was sufficient, because the Sheriff is not bound to execute the Writ in person; besides 'tis good, because 'tis said to be done Virtute Brevis, which by the Conclusion paratum habeo amounts to Attachiavi.

But per Holt Ch. Justice, it would have been ill if the Words Virtute Brevis had been omitted; and that 'tis sufficient if the Substance of the Writ is answered, tho' not in the same Words; & per Curiam, if the Return of this original Writ had been ill, the Appearance of the Party could not have helped it, as was strongly insisted on by the other Side, for 'tis oppositum in objecto.

(6.) The next Objection to the Return was, That 'tis absurd, for it was ejus quidem Corpus ad diem infracontent' coram Domino Rege & Domina Regina ubicunq; &c. parat' habeo.

Now all Returns are supposed to be made in Court, and the Place where the Courts sit is certain; therefore to say, that he hath the Body here in Court ready, &c. (wherever the Court be) ubicunque, &c. is absurd and Nonsense.

46 E. 3. 30.
Surplusage.

To which it was answered, That the Word Ubicunque was Surplusage and void.

(7.) Objection that here is a Discontinuance, or at least a Miscontinuance as to Part, for the Defendant hath demurred to the Writ, to the Return, and to the Count jointly, and the Plaintiff hath joined in Demurrer only as to the Count.

And his Answer to the Demurrer to the Writ, is quoad placitum prædicti Johannis Law superius ad breve placitar', &c. whereas there was no Plea to the Writ, but only a Demurrer, so no Answer.

And as to the Demurrer to the Return, 'tis discontinued, and there is no Answer made to it, for the Quoad is single, (viz.) Quoad placitum ad breve placitar', and not ad breve & Return' inde placitar', 'tis true the Return is mentioned afterwards; but that will not help, because the Reply is confined to the Writ only by the Quoad, which always governs the Plea and Demurrer, &c. with respect to their Extent, &c. and if the Matter shewn is larger than the Quoad, 'tis useless and void, and sometimes makes the whole vicious.

To which it was answered and so resolved, as in all the Points supra, that the Word Placitum doth comprehend Demurrers, and all Pleadings whatsoever, for 'tis nomen collectivu', and is used promiscuously to express any Part

Part of Pleading; and the Joinder in Demurrer here follows the Defendant in his own Form, because the Commencement of the Demurrer is Petit judicium de brevi & narratione prædicta. not saying de return. brevis; and this is in Nature of a Plea and Demurrer, for it concludes in Abatement of the Writ only, (viz.) Quod breve ill. cassetur; wherefore no Discontinuance or Miscontinuance of any Part.

Co. Ent. 56, 57, 89.

Nota, That afterwards the Defendant escaped from the Marshal, which he confessed in open Court on the Continuance Day, which was then recorded; and the Plaintiffs proceeded to the * Exigent against him.

* Rast. Ent. 56. b.

D E

Term. Sanct. Hill.

6 Willielmi 3. B. R.

Curry *versus* Stephenson. Hill. 5 Will. & Mar. B. R. Rot. 37.

THE Plaintiff Curry and his Wife, as Administratrix of one Jackson, brought an Indebitatus Assumpsit against the Defendant, wherein they declared, that the Defendant on such a Day Indebitatus suit to the Plaintiffs William and Anne, as Administratrix of one Jackson in 25 l. for so much Money by the Defendant ad usum ipsorum Will. & Annæ ut Administratrici,

Salk. 421.
4 Mod. 376.
Statute of Limitations pleaded to an Action brought by an Administrator; he shall have six Years next after the Granting the Administration.

stratrici, &c. of Jackson ante tempus illud habit. & recept. which he promised to pay.

And then they shew, that Letters of Administration were committed to the Wife on such a Day by the Archbishop of York, in the same Year in which the Action was brought, with a Proferat hic in Curia.

The Defendant pleads, that causa actionis prædictæ non accrevit præfat. Will. & Annæ ad aliquod tempus infra sex Annos, &c.

The Plaintiffs replied, that Jackson died on such a Day, and at such a Place intestate (which in Truth was above six Years before the Action brought) but that no Administration of his Goods was committed to any Person until such a Day, (viz.) The Day in the Declaration mentioned, upon which Day Administration of all his Goods was committed to Anne, the Wife, now Plaintiff, as in the Declaration is set forth. Et sic causa actionis prædictæ accrevit (to the Plaintiffs) infra sex Annos prox. ante diem exhibitionis Billæ, &c. (viz.) On the Day on which the Administration was committed, Et hoc petunt quod inquiretur per patriam.

And upon a Demurrer to this Replication the Cause was debated several Times; and it was argued for the Defendant, that the Replication was ill, because of the special Matter, for the Plaintiff should have replied generally, Quod causa actionis accrevit infra sex Annos, without saying more.

Surplusage.

To which it was answered, that the special Matter could not hurt, if it did no good, for then it would be but Surplusage, and here was an Issue offered in the Plea; and that it was like a special Replication upon a Plea of Nil habuit in tenementis, which concludes, Et sic habuit sufficient. statum, &c. Et hoc petit, &c.

But Holt Ch. Justice took two Exceptions to the Declaration.

(1.) First, That it was alledged that the Defendant was indebted to the Plaintiffs William and Anne, ut administratrici, &c. which could not well be, for if the Receipt of the Money was after the Death of the Intestate, then it was received to the Use of the Plaintiffs generally, and not as Administratrici, &c.

As where Money due to an Intestate is paid to a third Party, to be paid over to the Administrator, there the Administrator

ministratoz must declare against the Defendant, for so much Money received to his Use generally.

But to this it was answered, that in this Case the Plaintiffs could not declare in any other Manner, because this 25 l. was left in Cash by the Intestate, and the Defendant took it after his (the Intestate's) Death, and long before any Administration granted; and for Authorities in this Point the Cases in the * Margin were cited.

* 2 Saund.
208. See
Champer-
non ver. Dar-
by, ante.

The 2d Exception made by the Chief Justice was, that the Money was said to be received by the Defendant, ad usum of the Husband and Wife, when it ought to be ad usum of the Wife alone, she being Administratrix.

To which it was answered, that in all Actions brought by Husband and Wife, who is Executrix or Administratrix, the Conclusion is or ought to be ad damnum ipsorum, which could not be, unless the Husband had some Sort of Right or Property; and in this Case it could not be to the Damage of the Husband, unless the Money was received, as well to his Use as to the Use of his Wife.

But at length, per Holt Chief Justice, the Declaration is good, for it was now the usual Form in such Cases; and he likewise held, that the Plea was good (tho' it was objected, that the Defendant ought to have pleaded Non Assumpsit infra sex Annos), because it appeared that the Cause of Action did accrue to the Plaintiff as soon as the Administration was granted, and not before, as by the Letters of Administration produced.

But per Holt Chief Justice, the Replication is ill, because 'tis concluded to the Country, by which Means the Defendant is excluded to give any Manner of Answer to the special Matter alledged; and the Plaintiff should have relied on that special Matter, and concluded with hoc parat. est verificare.

But as to the Matter in Law concerning the Operation of the Statute of Limitations, he was of Opinion, that the Administrator shall have six Years from the Time of Granting the Administration, according to Sanford's Case cited in Saffin's Case.

2 Cro. 60, 61.

Judgment against the Plaintiff.

X x

Jackson

Jackson versus Colegrave. In the Exchequer-Chamber, Saturday 2 Feb.

Indebitatus Assumpsit will not lie for a Wager, or Money won at Play.

ERROR on a Judgment in B. R. in an Action on the Case, wherein the Plaintiff declared, that the Defendant indebitat. fuit eidem quer. in 50 l. pro tant. denariorum summa eidem (the Plaintiff) debit. & solubil. pro & super pignore, Anglice, a Wager, inter eos ante tempus illud fact. & per ipsum (the Defendant) eidem (the Plaintiff) deperditum, and being so indebted, he promised to pay, &c.

Upon Non assumpsit pleaded, the Plaintiff had a Verdict and Judgment; and now upon a Writ of Error brought that Judgment was reversed, because a general Indebitatus Assumpsit will not lie for Money won on a Wager, or at Play, but it must be laid by Way of mutual Promises specially; but the chief Reason of this Opinion was, because the Court would not countenance Gaming, by giving such an easy Remedy for Money won at Play.

* 3 Lev. 118. Eggleston ver. Lewin. Hill 33, 34 Car. 2. B. R. Rot. 534.

But there was a * Precedent shewn, where an Indebitatus Assumpsit was brought for Money won at a Game called Banquetier, and Judgment for the Plaintiff, and that Judgment affirmed in a Writ of Error in the Exchequer-Chamber; but this would not prevail, for the Reason supra.

So the Judgment was reversed.

At the same Time it was allowed per Curiam, that a general Indebitatus Assumpsit will lie by an Insurer of a Ship, for the Premium for which he ensured, altho' the Consideration of such Insurance, (viz.) The Hazard of Loss is but a Contingency.

Edmonds versus Probert. Hill. 6 Will. 3. B. R. Rot. 156. but adjudged Pas. 7 Will. 3.

Where Matter of Law and Fact is assigned for Error, 'tis double, and the Plaintiff may have Advantage of it upon a Demurrer, but not after *In nullo est Erratum* pleaded.

DEBT upon Bond against Edmonds in C. B. Upon Non est factum pleaded, the Plaintiff had a Verdict and Judgment; and now upon a Writ of Error brought in B. R. there were three Errors assigned:

- (1.) That the Declaration was minus sufficiens in lege.
- (2.) That Judgment was given for the Plaintiff, when it should be for the Defendant.

(3.) That Probert the Plaintiff in the Action died before the Verdict given.

After which the Entry on the Record was in this manner.

¶ Et prædict' Henricus Probert per Johannem Lilly attorney suum venit & dicit quod nec in recordo & processu prædict' nec in redditione Judicii prædict' in ullo est erratum & petit quod Curia, &c. procedat ad examinandum Errores.

And upon opening this Record, it was agreed per Curiam, that this Assignment of Matter of Fact, and Matter of Law, was double, and would have been ill upon a general Demurrer; but the Advantage thereof is now lost by Pleading in nullo est Erratum.

It was likewise agreed, that the Entry on Record of Probert's coming by Attorney after it was alledged in the Assignment of the Errors, that he was dead before the Verdict, is senseless and absurd.

But as to this Matter, the first Fault was in the Plaintiff in the Writ of Error; for after he had alledged the Death of the Plaintiff in the original Action, he ought not to have made the common Conclusion as in other Cases; but he should have concluded by praying a Sci' fa' ad audiend' Errores against the Executor or Administrator of Probert; and if the Sheriff had returned, that Probert was alive, then he might come in and plead in nullo est Erratum. ut supra; but if he returned Scire feci the Executors or Administrators, that would be a sufficient Ground for the Court to proceed and to examine Errors, &c.

Wherefore, because the Plaintiff in the Writ of Error had not pursued this Method, the Judgment was affirmed, no Body appearing for him.

However, in * Dove and Darcy's Case, the Error in Fact was assigned, that the Plaintiff in the Ejectment, died before Judgment, and his Attorney pleaded in nullo est Erratum, for that the Plaintiff was living at such a Place, &c. upon which they were at Issue, and it was found, that he was dead; and thereupon the Judgment was reversed, for this Error found by the Jury; and Holt Chief Justice remembered this Case, and said, that it puzzled the Court for some Time, and that it was not fully reported, and that he took the Law to be otherwise.

* Sid. 93.
Raym. 59.

Ward *versus* Everard. Hill. 6 Willi. 3. B. R. Rot.
718.

5 Mod. 25.
1 Salk. 390.

Grant of an
Annuity of
100 l. per ann.
to 5 Persons,
(viz.) 20 l.
to each of
them, &c.
this is a several
Rent.

* These are
the very
Words of
the Deed.

IN Replevin, &c. of Cattle taken in Quarrington in Lincolnshire.

The Defendant made Conusance as Bailiff to Carina Hetley, and Elizabeth English, Widows, for that the Place where, &c. was Parcel of a Messuage whereof Sir Robert Carr, Bar. was seised in Fee; and being so seised, did, upon the second Day of March, Anno 1638. per quoddam scriptum suum obligatorium (& quoad diem & mensem sine datu) sed geren' datum in eodem ann. 1638. grant unto the said Carina and Elizabeth by the Name of Carina Cromwell, and Elizabeth Cromwell, and to Pembroke Cromwell, Henry Cromwell, and Anne Cromwell and their Assigns, one Annuity or yearly Rent of * One Hundred Pounds by the Year of lawful English Money, (viz.) Twenty Pounds a-piece, to be equally and respectively divided amongst them, and to be issuing and going out of the Locus in quo (inter alia) to have and to hold, perceive and enjoy the said Annuity or yearly Rent of one Hundred Pounds by the Year unto the said Pembroke Cromwell, and the other Four, and to their Assigns respectively to every of them Twenty Pounds, from and immediately after the Death of the Lady Anne Carr their Mother, for and during the said Term or Terms of the natural Lives of them the said P. D. A. C. C. and the Lives of them, and every of them respectively, payable yearly during the said Term or Terms at Michaelmas and Lady Day.

And farther, that upon the Death of one of the said Parties, (viz.) P. D. A. C. or C. which shall first happen, the Annuity or yearly Rent of Twenty Pounds per ann. formerly due to the Party so deceased as aforesaid, shall be yearly paid to the other four surviving Parties at the Feasts aforesaid, during their several natural Lives; (the like upon the Death of the second and third Party, but no farther,) and that then the said several Annuities or yearly Rents due to the last two surviving Parties, amounting to the Sum of Fifty Pounds a-piece, shall be paid to them respectively at the Feasts aforesaid by equal Portions, during their natural Lives.

I

And

And if the said Rent of a Hundred Pounds by the Year, severally divided to the Parties aforesaid, or any Part thereof shall happen to be behind, then to distrain, &c.

Then the Defendants set forth, that all the Grantees were dead except the said Carina and Elizabeth.

Et quia omnis illa annuitas five annualis redditus quinquaginta librarum seu separal' annuitas viginti & quinque librarum ipsos Carinam & Elizabetham sic ut præfertur contingen' pro quindecim Annis & dimid' unius Anni finit' (at Lady-Day 1672.) in toto se attingen' ad 775 l. necnon omnis illa annuitas five annual' Redditus 100 l. seu separal' annuitas 50 l. ipsas Carinam & Elizabetham sic ut præfertur contingen' pro viginti Annis & dimid' unius Anni finit' (at Lady-Day) prox' ante prædict' tempus quo, &c. in toto se attingen' ad 2200 l. eisdem Carinæ & Elizabethæ aretro fuer' & insolut', (viz.) Medietas inde utrique eorum, &c. for this the Defendant made Conusance, &c.

The Plaintiff prayed Oyer of this Grant, and it appeared to be by Deed Poll thus:

¶ To all Christian People, &c. and concluded thus, In Witness whereof the Parties to these present Indentures their Hands and Seals interchangeably have set, the Day and Year first above-written 1638.

But there was no Day or Year before named throughout the whole Deed.

Then the Plaintiff pleaded a private Act of Parliament made ann. 16 Car. 2. by which Sir Robert Carr's Estate was settled, and put out of his Power to charge at any Time after 1 April 1639. and avers, that this Grant was not made upon, or at any Time before the said 1 April 1639. and Issue was joined upon that Point, which was tried at Bar, and the Defendant had a Verdict.

And now it was moved in Arrest of Judgment in Behalf of the Plaintiff, for that the Defendant had made a joint Conusance in the Name of Carina Hetley, and Elizabeth English, which cannot be done by Law; for they were neither Jointtenants, or Tenants in Common, because by the Grant, the Rents are several, and not one entire Rent, for the Grantor designed to grant five several Rents, (viz.) 20 l. per ann. to each Grantee, and that no Survivorship should take Place, which is very plain by his Granting over the Annuity to the Survivors of them who first died, which would have been idle, if they had a joint Estate before.

Be.

Besides the Words respectively and severally are used in all the necessary Places of the Grant, which shews that the Grantor intended to give several Rents; for the Nature of the Word Respectively is to make that several, which otherwise would be joint, and to avoid vain Repetitions of one and the same Expression, which must be used without the Word, as it appears by the Form of * Pleading.

* 11 H. 6.
11. b.
Rast. Ent.
622, 623. a.

Therefore it was concluded, that these were several Rents, and could not be joined in one and the same Avowry of Conusance; but that the Distresses and the Avowries ought to be † several, as being upon several Titles to distinct Persons, &c.

† 17 Ass. pl-
cito 10.
Dyer 306,
309.

Cro. Eliz. 340, 341. 637 651. Yel. 23, 24. Cro. Car. 154. W. Jones 207.

Econtra.

On the other Side it was argued, that this Grant was joint, and that it was one entire Rent of 100 l. per ann. granted to all the Grantees, for that the very Words of the Grant are of one Annuity of yearly Rent of 100 l. by the Year, and the Words, (viz.) 20 l. a-piece to be equally and respectively divided amongst them are subsequent, and come under a * (viz.), which shews that they should share it equally between them, but doth not sever the Grant which was joint before.

* Knight's
Case.
5 Rep.
2 Roll. Abr.
90.
4 Leon. 187.
2 Cro. 259.

After several Debates, Justice Sam. Eyre delivered his Opinion for the Plaintiff, that these were several Rents; but Holt Chief Justice doubted, and there being no more Judges in Court, no Judgment was given.

But sometime afterwards the Grantees took new Distresses severally, and upon new Replevins brought, they made several Avowries as for several Rents, and then the Parties agreed, and nothing farther was done.

See Mich. 14 Car. 2. Rot. 583. Hamerton *versus* Clayton & al' in C. B. which was an Avowry upon this very Grant, and the Defendants made Conusance (in Replevin) as Bailiffs to the said Henry Cromwell, Anne, Carina, and Elizabeth jointly for Rent Arrear.

And upon a Demurrer to the Conusance, the Plaintiff had * Judgment, for the Reason *supra*, because these were several Rents.

* The Rule
for Judg-
ment was
Pas. 16 Car. 1.

Leigh *versus* Brace. Hill. 6 Will. 3. B. R.
Rot. 929.

UPON a special Verdict in Ejectment, the Case was as followeth:

J. Walter Brace being seised in fee of the Lands in Question, made a voluntary Feoffment thereof to A. and B. and their Heirs, to the Use of Walter Brace for Life, and afterwards to the Use of Thomas Brace and his Heirs for ever; and for Default of Issue of the Body of Thomas Brace, then to the Use of the right Heirs of the said Walter Brace.

Walter Brace died, and Thomas entered, and by his Will devised those Lands to the Lessor of the Plaintiff, and then died without Issue, and the Defendant was right Heir to Walter the Feoffor.

The Question was, Whether by the Limitation of the Uses in this Feoffment, Thomas Brace took an Estate in Fee-simple, or else but an Estate-tail only, (as if it had been in a Will) for it was agreed on all Sides, that such a Limitation in a Will would be only an Estate-tail, because the * Limitation of a Remainder over upon his dying without Issue of his Body, shews, that it was only intended the Heirs of his Body, and the Intention of the Testator governs his Will.

But this being a Conveyance in the Life-time of the Feoffor, would make a Difference, as it was objected.

Sed per Curiam, It makes no Difference, because it was a Conveyance by Way of Use, which hath been always construed like Wills, with Respect to the Intention of the Parties, and is not tied up to the strict Forms of Conveyances at Common Law.

And so it was adjudged in C. B. upon this very † Deed, upon a special Verdict there, upon which Judgment the now Defendant recovered the Possession; and so the Lessor of the Plaintiff brought his Ejectment here.

Judgment for the Defendant.

§ Mod. 266.
Conveyance
by Way of
Use shall be
construed
according to
the Intention
of the Par-
ties.

* 1 Roll. Abr.
839.
Lit. Rep.
253, 285.
Style 315,
344. Beck's
Case.

† Between
Coke *versus*
Roberts.
Hill. 2 Will.
in C. B.
Rot. 575.

DE

D E

Term. Paschæ.

Anno 7 Willielmi 3. B. R.

Masters *versus* Lewis.

§ Mod. 75,
92.
Proceedings
on a Foreign
Attachment,
not good.

* Because,
till Admini-
stration
granted, the
Ordinary re-
presents the
Person of the
Intestate.

ONE Masters, who was late Husband of the Plaintiff, was indebted to Gosfricht, and Lewis was indebted to Masters by simple Contract.

Masters died Intestate in London, and the Plaintiff Alice, his Widow, sues for Letters of Administration in the Spiritual Court, against which Gosfricht entered a Caveat, and pending the Dispute about the Caveat, he lebled a Plaint in the Sheriff's Court of London against the * Archbishop of Canterbury; and upon Non est inventus returned, a foreign Attachment issued to attach the Debt in the hands of Lewis, which was accordingly done; and afterwards there was Judgment against Lewis the Garnishee, for the Non-appearance of the Archbishop, according to the Usage in Cases of Foreign Attachments.

Afterwards Administration was committed to the Plaintiff, and she, as Administratrix to her late Husband, brings an Assumpsit against Lewis for the Money due to her Intestate.

Upon Non Assumpsit pleaded, these Proceedings were given in Evidence for the Defendant in his Discharge at the Nisi prius at Guild-hall, London, before Holt Ch. Justice, and he ordered the whole Matter to be drawn up, and a Case made of it, which was accordingly done.

And now it was argued for the Defendant Lewis, that here was a Judgment against him for this Money upon the Foreign Attachment, which he could not avoid, and there-

for no Reason that he should be doubly charged; and if this Judgment is erroneous, the Plaintiff, or the Archbishop may bring a Writ of Error, or the Administratrix may put in Bail for the Archbishop in the Sheriff's Court, and so try the Cause of Action there.

And it was farther argued, that the Ordinary is accountable, even after Administration granted, &c.

On the other Side it was said for the Plaintiff, that the Question is not, Whether there is such a Custom in London, ut supra; but whether this Case is within the Custom of Foreign Attachments; and certainly no Action will lie against the Ordinary, unless he hath Assets in his Hands at that Time when the Action is brought, which of Necessity must be alledged, both in the Writ and in the Declaration.

Contra for the Plaintiff.

F.N.B.120.B
9 Rep. Hen-
nes's Case.

And it was insisted, that no Suit could be maintained against the Archbishop, and 'tis plain that he could not have any Action against Lewis for the Recovery of this Debt; for the Ordinary could never maintain an Action for the Assets of an Intestate.

And 'tis to be observed, that in these Cases of Foreign Attachments, the Suit against the Garnishee is in Right of the Defendant against whom the original Plaint was levied; but here the Archbishop, who was the original Defendant, could not maintain any Action against the Garnishee, and by Consequence no other Person can do it in his Right.

Dyer 147. a.

Wherefore the Summons of the Archbishop, by attaching the Debt in his Hands was meerly void, because he had no Right to the Debt, nor any Means to recover it.

And if this Practice should be allowed, then Debts upon simple Contract would be paid before Judgments, because the Custom of London warrants a Plaint in Debt by an Executor upon a simple Contract; besides, this would be a Means for every Creditor to be his own Carver, and so waste the Goods of the Intestate without Remedy.

Et per Curiam, The Foreign Attachment is only a Means to enforce the Defendant in the original Action to appear by Attaching his Goods on Debt in the Hands of a third Person, who is the Garnishee; but here the Ordinary hath no Right to the Debt, and therefore out of the Reason of the Custom. Sed Adjournatur.

Curia.

In Michaelmas-Term, 7 Willi. This Case was moved again, and then per Curiam, the Judgment was given for the Plaintiff, and that this pretended Custom was unreasonable, and void, tho' the Defendant produced several Re-

copies of this Writ for about 100 Years last past, but none were controverted.

Fuller *versus* Fotch & al.

Action against Commissioners of Excise.

T Respass against Fotch and other Commissioners of Excise, and their under Officers, for Taking the Money of the Plaintiff by Virtue of a Warrant from the Commissioners, upon a Judgment given by them against the Plaintiff, upon an Information against him for erecting a new Mash-tat, and using it without Notice, against the Statute 3 & 4 W. & M. which was made for ordering the Duty on Low Wines; and the Money was taken for the Forfeiture given by that Statute.

The Defendant having pleaded Not guilty, the Cause was tried at the Nisi prius before Holt Ch. Justice in London, and he gave in Evidence this Information, Judgment, and Warrant, &c.

To which it was objected,

(1.) That the Copy of this Conviction was no Evidence, but that the original Book of Entry ought to be produced.

Sed per Holt Ch. Justice, The Copy may be given in Evidence.

(2.) That it ought to be proved, that the Commissioners did give the Judgment recited in the Copy of the Conviction.

Which Holt Ch. Justice denied, because it proved it self.

(3.) That this Judgment is not peremptory, for the Plaintiff in this Action is at Liberty to disprove the Truth of the Matter of fact, upon which they grounded their Judgment.

Sed per Curiam, That was denied upon this Diversity, (viz.) That if the Commissioners had intermeddled with a Thing which was not within their Jurisdiction, then all is coram non iudice, and that may be given in Evidence upon this Action; but tis otherwise if they are only mistaken in their Judgment in a Matter within their Consuance, for that is not Inquircable, otherwise than upon an Appeal.

Hardres 478,
480, 481.
Cro. Car. 395.
1 Vent. 273.

The King *versus* Inhabitants of Titchshall in Norfolk. Filed amongst the Orders Hill. 6 Will. & Mar. N^o 21.

Where a poor Man coming in with a Certificate shall gain a Settlement, where not.

O NE Searle, and his Wife, came from the Parish of Titchshall to the Parish of St. Nicholas in Ipswich, and there he dwelt from the Year 1680, to the Year 1694. which

which was fourteen Years, in which Time he had two Children born there; and being very poor, the Recorder of Ipswich and another Justice made an Order to remove him to the Parish of Titchhall, reciting,

That whereas Searle and his Wife had for several Years been permitted to dwell in the Parish of St. Nicholas upon a Certificate from the Parson, Churchwardens and Overseers of the Poor, and of several other chief Inhabitants of the Parish of Titchhall, owning him the said Henry Searle to be an Inhabitant there; and thereby promising to receive him, his Wife and Family at any Time after, and when he or they should be sent to the said Parish of Titchhall, or should be likely to be chargeable unto the said Parish of St. Nicholas; and Oath having been made before us, or one of us, of the Truth of the said Certificate; and the Churchwardens of St. Nicholas now complaining, &c. and whereas upon due Examination of them the said Henry Searle and Martha his Wife by us, we find that the last Place of the legal Settlement of them and their two Children was, and is at Titchhall aforesaid; these are therefore, &c.

This Order was confirmed upon an Appeal, and afterwards both the said Orders were removed into B. R. by Certiorari; and now it was moved to quash the original Order, for that the Judgment of the two Justices was founded on a Mistake of the Law, they apprehending that this Certificate did prevent the Operation of the Law in gaining a Settlement to Searle, &c. Whereas a Certificate amounts to no more than a personal Contract, upon which an Action might lie, but could not possibly bar Searle, from that Right of Settlement which he had gained in the Parish of St. Nicholas by his long Residence there.

And for this Reason the Order was quashed.

Nota; The Law is since settled by the Statute 9 & 10 Will. by which 'tis made certain by what Means a Man having a Certificate, shall gain a Settlement, and where not.

Young *versus* Rudd, un', &c. Intratur Pasch.
7 Will. B. R. Rot. 181.

Indebitatus assumpsit, for Wares sold and delivered.

The Defendant pleaded, that after the Promises in the Declaration mentioned, (viz) on such a Day he gave and delivered unto the Plaintiff a Bever-Hat in Satisfaction and Discharge of the said several Promises in the Declaration;

§ Mod. 86.
2 Salk. 627.
Where Acceptance must be pleaded in Satisfaction.

ration; and that the Plaintiff then and there had, and accepted the said Hat in full Satisfaction and Discharge of the Promises, & hoc, &c.

The Plaintiff replied Protestando, that the Defendant never gave him (the Plaintiff) any such Hat in Satisfaction and Discharge of the said Promises, pro placito dicit, that he never accepted a Bever-Hat in Satisfaction and Discharge of the said Promises, prout, &c. & hoc petit quod inquiratur per patriam.

And upon Demurrer to this Replication, it was very much insisted, that the Issue in this Case ought to be upon the giving in Satisfaction, and not upon the receiving in Satisfaction, because every Gift or Payment must be directed by him who gives or pays, and not by him who receives it, as it was resolved in * Pinnell's Case.

Wherefore if the Plaintiff did receive the Hat of the Defendant, and he gave it in Satisfaction, &c. then the Plaintiff had it in Satisfaction, &c. tho' he might take it with an Intent to apply it otherwise; and therefore the Issue shall not be upon his Acceptance, but upon the Payment which is the principal Matter that guides the other; sed adjournatur.

And upon Monday 18 Nov. 1695. it was moved again, and the Cases in the * Margin were cited to maintain the Issue supra.

Et per Curiam, The Issue is well enough, and that the whole Matter concerning the Payment as well as the Acceptance in Satisfaction would be tried upon this Issue; and it may be taken either Way, (viz.) Upon the Delivery in Satisfaction, or upon the Acceptance in Satisfaction, at Election, &c.

Another Objection by the Plaintiff's Counsel was to the Form of this Plea; for that it was pleaded to be given in Satisfaction and Discharge of the Promises, &c. when it should be pleaded in Satisfaction of the Money mentioned in the Promises, and not of the very Promises.

Sed non allocatur; So Judgment was given for the Plaintiff, that he had rendered a good Issue wherein the Defendant ought to have joined.

The King *versus* Walcott, on the Crown-Side.

4 Mod. 395.
Cases Adj.
127.
2 Salk. 631.

WRIT of Error brought by John Walcott, Son and Heir of Thomas Walcott, to reverse an Attainder of

* 5 Rep.

* Winch. 76.
Stile 239.
3 Brownl.
Ent. 142.
Aston Ent.
451.
9 Rep. 78.
at the End of
Peytoe's
Case. *

of High Treason against his said Father, who was executed, &c.

This Writ was directed to the Justices of Goal-Deliber-ry of the Prisoners in Newgate, for that Tho. Walcott was tried and convicted at the Old-Baily, as being concerned against the Life of Car. 2. in the Rye-house-Plot; and the Indictment, Conviction and Judgment thereon being certified upon the Writ of Error, it appeared that the Judgment was thus:

Attainder in High Treason reversed for omitting these Words *ipsoque vivente comburentur.*

It. Concessum est per Curiam hic quod prædict' Thomas Walcott ducatur ad Gaolam dicti Domini Regis de Newgate unde venit & ibidem super Bigam ponatur & abinde usque ad furcas trabatur & ibidem per collum suspendatur & vivens ad terram prosternatur & quod secreta membra amputentur & interiora sua extra ventrem suam capiantur & in ignem ponantur & ibidem comburentur & quod caput ejus amputetur quodque corpus ejus in quatuor partes dividatur & quod caput & quarteria illa ponantur ubi Dominus Rex ea assignare voluit, &c.

The Error insisted on was, the Omission of the following Words in the Judgment, (viz.) *Ipsaque vivente*, or in conspectu suo, between the Words *in ignem ponantur* and the Word *Comburentur*, for the Words *ipsoque vivente* and in conspectu suo are all one.

Staundf. placita Coronæ 182. 3 Inst. 212.

And after long Debate, the Court of B. R. reversed the Judgment for the Omission supra; for it was held to be a material Part of the Judgment, and upon a Writ of Error in the House of Lords, this Judgment of Reversal was affirmed by a Majority of one Vote.

Nota, That upon great Search of Records of Attainders for Treason, for the Space of 150 Years back, it appeared, that these Words were generally inserted in the Judgment; but then some other Circumstances which are mentioned in Staundford and Coke are omitted, and amongst them all this Judgment seems to be nearest those two Books; for this is full in every Thing, but only the Omission of these Words.

And 'tis to be observed, that even Staundford and Coke differ in the several Forms of a Judgment in Treason by them set down; and it appeared upon Search supra, that before the Time of H. 7. the Judgment in Treason was very incertain, and that there are scarce two Records which agree in the same Form.

D E

Term. Sanct. Trin.

Anno 7 Willielmi 3. in B. R.

The King *versus* Kemp.

A Judged by Holt Chief Justice, and Sir Sam. Eyre, the last Day of this Term, Justice Giles Eyre being lately dead, and Justice Gregory absent by reason of Infirmitie.

4 Mod. 273.

S. C.

2 Salk. 463.

S. C.

A Case up-

on the

King's Grant

of an Office.

The Case was upon a Sci. fa. brought by the King, &c. against Kemp, to repeal a Patent granted to him for the Office of a Searcher for the Customs in the Port of Plymouth; this Writ issued out of the Petty-Bag in Chancery; and upon the Pleadings, there was a Demurrer, and Joinder in Demurrer; and then the Record was transmitted into the King's Bench to have the Matter in Law determined on the Demurrer.

Upon the arguing this Case several Times, it appeared to be as followeth:

H. King Car. 2. by Letters Patent granted this Office of Searcher unto John Martin, durante beneplacito of the King.

Afterwards the same King taking Notice of this Grant to Martin, made another Grant of the same Office unto one Fryer for Life, habendum post mortem sursum redditionem five foresfacturam of the Estate of John Martin.

After that the same King Car. 2. by another Patent re-citing the Grant to Fryer, in Consideration of the Surrender of Fryer's Patent, granted the said Office unto Kemp for Life, by Virtue whereof he was now in Possession of that Office, &c.

The sole Question was, upon the Validity of Fryer's Patent, against which it was objected, that it was void for the Reasons following:

(1.) Because it was to commence post mortem sursum redditionem five forisfacturam of Martin, when Martin had no more than an Estate at Will, which could neither be surrendered or forfeited, because any Act of Surrender or Forfeiture is a Determination of the Will, and puts an End to the Estate.

(2.) This Grant to Fryer was void, because it was of a Freehold, and yet limited to commence in futuro, whereas a Freehold cannot expect and be in Suspence in the mean Time.

Then it was argued, that the King was deceived, both in his Grants to Fryer and Kemp; he was deceived in his Grant to Fryer, because he was mistaken as to the Time of the Commencement thereof, and also as to the Quality of the Estate which Martin had in this Office; for the King apprehended that Martin had such a durable Estate as might have supported a future Grant by Way of Reversion; and such which might be forfeited or surrendered.

Wherefore he intended, that Fryer's Grant should not commence, but upon one of these three Contingencies, (viz.) The Death, Forfeiture, or Surrender of Martin, whereas the Two last of these three Things were impossible; and where the King hath been * mistaken in his Grants, they are always held void.

Besides, at least the Grant to Fryer was no other than a Grant of an Office to take Effect when the King pleased, which is altogether uncertain, and would be void in the Case of a common Person, a fortiori against the † King.

Now if the King had died in the Life-time of Martin, that would have determined Martin's Estate, and yet the Grant to Fryer could not commence until after Martin's Death, so that by that Means there would be an intermediate Vacancy between the Determination of the first and the Commencement of the second Grant; and then if Fryer's Grant was void, the Grant to Kemp, which was made in Consideration of that void Grant, must also be void, for 'tis apparent the King was deceived in the Consideration of that Grant.

There was another Exception to the Form of the Patent made to Kemp, in which the principal Word was Assignavimus the said Kemp to have and execute the Office, &c. when it should be Concessimus, but that Word was omitted,

* 3 Leon. 5.
5 Rep. 94.
6 Rep.
Green's Case.
1 Inst. 57. 4.
2 Brownl.
241.
Dyer 197.

† 3 Leon. 244.
1 Inst. 4.

Objection to
the Form of
the Patent.

14 Ric. 2. 10.
Dyer 107.

omitted, and the Clause *pro hæredibus & successoribus nostris* was likewise omitted, so that this Grant would not bind the King's Successors.

To which it was answered, that *Assignavimus* is the most proper Word, because this is not an Office wherein the King had an Estate, but 'tis only an Employment, and therefore cannot be properly granted but appointed; and in such Case there is no Need, that it should be *pro hæredibus & successoribus*, for 'tis good against the Successor, without these Words.

See Rut-
land's Case.
2 Brownl.
328.
1 And. pl. 201.
Plowd. 432.
Sir Tho.
Wroth's Case.

And as to the other Objections it was answered, that the Grant to Fryer was not a Grant of a Reversion, nor did it need any Support from a particular Estate to make it good, but it was only a Grant of a future Interest to commence upon a Contingency.

* 3 Leon. 31.
Dy. 239, 270.
3 H. 7. casu
ult.
1 Cro. Young
vers. Stowell.
Dyer 80.
Hob. 150.
9 H. 4. 5.

And the Books make a Difference between the King's Grant of an Office in Reversion and such a Grant in Reversion by a Subject; for in the first Case it hath always been held good, tho' in the last Case there hath been a Distinction taken between a Grant in Reversion and a Grant to commence in * futuro.

And as to the Objection, that here is a Grant of a Freehold to commence in futuro, it was answered, that there is a Difference between this Case and a Grant of a Freehold in Lands, or of an ancient Office, or of a Rent in esse, for in all these Cases such a Grant as this to commence in futuro, would be void, because the Freehold was in Being at the Time of the Grant, and before.

Of a Grant
to com-
mence in
futuro.

But here this Office (if it may be so called) had no Existence before the Grant, but receives its Being from it; and 'tis the same exactly with a Grant of a Rent *de novo*, for Life or in Fee, which may be limited to commence in futuro, upon any Contingency that the Grantor shall appoint; for there is no Freehold in Being till the Grant takes Effect, and by Consequence no Suspension of any Freehold.

'Tis not doubted, but that such an Office as this may be granted to commence in futuro, when there is no Body in Possession of it; and by the same Reason it may be so granted when one is in Possession of it, for the Quality of the Grant is the same in both Cases; and the latter is not a Grant of a Remainder or Reversion, so as to need the Support of some particular Estate, but 'tis only a Grant of a future Interest, or of an Interest to commence in futuro, when there is one in Possession, for this Office consists only

in Grant, and hath a Being no longer than the Grant endures, but is afterwards extinct in the King.

So that this Office is different from Offices of Inheritance which come to the King by Forfeiture, for they have still an Existence, and therefore cannot be granted over to commence in futuro, for then the Freehold would be in Abeyance.

But in this Case all the Right the King hath is a Right only of Nomination, and the Office exists, and ceaseth to exist at the King's Pleasure, and he who hath it must have it by Way of new Creation.

9 Rep. 47.
2 Roll. Abr.
154.

So then this Grant cannot be said to be void, because it was to commence upon three Contingencies, whereof Two were impossible, but that is no Damage to the King, but the less worth to the Granter, because it should not take Effect till after Martin's Death.

And Holt Ch. Justice argued, that tho' the Grant of the Office to Martin was at the Will of the King, yet Martin had no Power to determine his Employment, but by Surrender, for this is not like the common Cases of Estates at Will, which are ever at the Will of both Parties.

But here the Granter having Authority from the King by a Patent of Record, 'tis requisite for him to make a Surrender on Record, to determine his Employment, as in the Case of the Lord Ch. Justice Hall, and other Judges, who held their Places only durante beneplacito, yet when they desired to desist, they made actual Surrenders on Record before a Master in Chancery.

So that in this Case it was a proper Commencement after the Surrender of Martin, who might also forfeit his Estate by Misbehaviour, &c. of which the King doth not arbitrarily take Notice, but by Way of Inquisition, upon which the Misbehaviour is found and returned; and therefore the Commencement of the Patent upon the Forfeiture of Martin, is likewise proper.

And for the Reasons supra, Judgment was given against the King for the Defendant Kemp, &c.

Redshaw *versus* Helther. Trin. 7 Will. 3. B. R.
Rot. 178.

DEBT against an Heir, who pleaded Riens per Descent on the Day of the Bill: The Plaintiff replied specially, that the Obligor (Father of the Defendant) died on such

5 Mod. 122.
Debt against
an Heir, who
pleaded Riens
per Descent.

* 3 & 4 W.
& M. c. 14.

such a Day, and that the Defendant (after the Death of his Father) and before the Day of the Will, &c. (viz.) On such a Day, which was a Day after the Death of the Obligor, had Lands by Descent from his Father in Fee-simple. Unde prædicto (the Plaintiff) de debito prædicti satisfecisse potuit, (viz.) apud H. prædict. & hoc parat. est verificare, unde petit judicium, according to the new

* Statute.

To this the Defendant made a frivolous Rejoinder, and thereupon the Plaintiff demurred.

The Question was, If the Replication was good in Pursuance of the new Statute; for it was objected that it was ill, because the Plaintiff had put the Value of the Lands in Issue by these Words, Unde, &c. de debito prædicti satisfecisse potuit, which ought to have been omitted, because the Statute is express, that after the Issue tried the Jury shall inquire of the Value; so that the Matter of Inquest only ex officio, and not to be the Point of the Issue.

And by this new Statute, the Plaintiff is only to recover pro tanto against the Defendant, with Respect to the Value of such aliened Assets, and is not to have a general Judgment against the Heir, as at Common Law, upon a false Plea.

Curia.

Sed per Curiam, Upon Debate this Replication was held good, and as it ought to be; and that if Unde, &c. de debito prædicti satisfecisse potuit had been left out, it might have been a good Cause of Objection; for the Statute doth not give Occasion to alter any more of the Form of the Replication common in such Cases, but only as to the Time concerning the Assets by Descent; and the Conclusion, which (before the Statute) was to the Country, must now be with an Averment only, because the Defendants may have an Opportunity to answer the new Matter alledged in the Replication.

The Plaintiffs had Judgment.

Davis *versus* Stringer. Trin. 7 Will. 3. B. R.
Rot. 373.

Jurisdiction
of a County
Palatine
must be
pleaded.

THIS was an Action of Annuity by Way of Bill brought against the Defendant in Custodia Mar', &c. according to the usual Form; and in the Margin of the Declaration it appeared, that the Action was laid in Chester, and the Visne was laid at Tarvin in Com. Chester.

To this Declaration the Defendant demurred specially, ^{4 Inst. 212.} and shewed for Cause, that it appeared by it, that this Court had no Jurisdiction of this Cause, for that the Matter did arise in a County Palatine.

Sed per Curiam, The Defendant cannot take Advantage ^{Curia.} of this Matter by way of Demurrer; but if he would have ^{4 Inst. 219.} any Benefit by it, he should have pleaded to the Jurisdiction of this Court; for without such Plea this Court doth never allow the Jurisdiction of the Counties Palatine, so far as to supersede their own Proceedings; besides, it appears by this Declaration, that the Defendant is in Custodia Mar, and so out of the Reach of a County Palatine.

Et per Curiam, Where a Defendant pleads to the Jurisdiction of this Court, (viz.) That the Cause of Action did arise within a County Palatine, it must be averred in such Plea, either that the Defendant dwelleth in the County Palatine, or that he hath Goods and Chattels therein sufficient, by which he may be attached, otherwise the Plea cannot be allowed least a Failure of Justice should ensue.

For if the Defendant or his Estate are out of the Reach of the County Palatine, the Courts at Westminster must necessarily hold Plea of the Matter, tho' it did arise within the County Palatine; otherwise the Law would be deficient; and therefore the Court in this Case were ready to give Judgment for the Plaintiff.

But then another Objection was made, (viz.) In the ^{Memorandum} Memorandum in the Beginning of the Record, it was ^{amended.} laid to be in placito debiti, but the Declaration was in a Plea of Annuity, and so a Variance.

To which it was answered, That the Memorandum was only the Entry of the Clerk who ought to have pursued the Declaration; and therefore it was moved, that the Court would amend this Mistake.

And at another Day the Court ordered the Memorandum to be amended, it being no other than the Mistake of the Clerk; and the Defendant could not demur upon this Mistake, because the Memorandum is never entered till after a Demurrer joined, &c.

Hussey versus Jacob. The Declaration was of Easter-Term, 6 W. & M. but the Plea was not entered till Trin. 7. so that the Record is of that Term; and Judgment was given by B. R. Trin. 8 Will.

5 Mod. 175.
1 Salk. 344.

THE Plaintiff Hussey brought an Action against Jacob a Goldsmith, upon a Bill of Exchange drawn by the Lord Chandos upon the said Jacob for 120 Guineas, which Bill was accepted.

Action upon
a Bill of Ex-
change for
Money won
at Play.

The Defendant Jacob pleaded in Bar, that after the 29th Day of September 1664. and before the Making that Bill of Exchange, (viz.) on such a Day, the said Lord Chandos and the Plaintiff Hussey played together with Dice at a certain Play called Hazard upon Tick and Credit without ready Money; and that the Lord Chandos, then and there at one Time and Meeting lost to the Plaintiff the said 120 Guineas upon Tick; and that for the Security of the Payment of the said Guineas lost as aforesaid, the said Lord Chandos on the Day and Year in the Declaration, &c. made the said Bill of Exchange, and directed it to the Defendant, requesting him to pay the Guineas, *ut supra*.

And that the Defendant did accept of the said Bill, and assume upon himself as the Plaintiff had declared.

* 16 Car. 2.
cap. 7.
See 1 Vent.
153, 154.
2 Mod. 34.
1 Sid. 394.

Quorum premissorum prætextu & vigore * statuti in eo casu editi & provis. the said Bill of Exchange so by him accepted, and the Acceptance thereof, and the Promise of the said Defendant so as aforesaid made, devenerunt & fuerunt & modo sunt vacua & nullius vigoris in lege & hoc, &c.

To this the Plaintiff demurred, and shewed for Cause, that it amounted to the general Issue.

And in the Arguing this Case, the Question in Law was, Whether this Bill being accepted, and the Action not being brought against the Person who lost the Money, nor upon the first Contract, but against the Defendant who was a Stranger to the Gaming, and upon a collateral Contract, (viz.) upon the Acceptance of the Bill according to the Custom of Merchants, was within the Intent and Meaning of the Statute made against Gaming.

And it was argued, that if this Case should be taken to be within that Statute, it would very much endanger the Credit of English Bills of Exchange, if they might be defeated by such collateral Matter; for it would be injurious to the publick Trade of England, both Foreign and Domestick.

Sed per Curiam, The Plea is good both as to the Matter and Form; and that it did not amount to the general Issue, and 'tis not a Rule, that because such a Matter may be given in Evidence; therefore it ought not to be pleaded specially, for it often happens to be in the Election of the Defendant, either to plead it specially, or not as he should be advised.

Curia.
Where a
Thing may
be given in
Evidence in
some Cases,
it need not
be pleaded
specially.

As for Instance, the Pleading a Release, Coverture, or Infancy in an Assumpsit is certainly good, and yet those Things might be given in Evidence upon non assumpsit pleaded; however the Defendant sometimes may not be willing to put such Matters of Law to the Judgment of the Jury, or perhaps may design to save the Costs of a special Verdict.

And as to the Inconveniency concerning Trade, there can be none in this particular Case, because the Bill is gone no farther than to the first Hands, (viz.) to the Hands of the Plaintiff Hussey who won the Money; and so no Damage could here accrue to any Person but to him who is certainly a Person within the Statute.

But if this Bill had been negotiated and endorsed to any other Person for Value received, then it might have another Consideration.

Judgment for the Defendant.

Vinkinstone *versus* Ebdon. Trin. 7 Will. B. R.
Rot. 45. but adjudged, Trin. 9 Will.

IN Trover, &c. for an Anchor, Cables and Sails of a Ship, &c.

Upon Not guilty pleaded, the Cause was tried at Newcastle, and a special Verdict was found to this Effect:

1. That the Plaintiff's Ship was in the Harbour of Newcastle, and there had taken in her Lading of Sea-Coals; and that by a Custom in Newcastle Time out of Mind, &c. a Toll of Five-Pence for every Chaldron of Coals there shipped off was due to the Corporation, in Consideration of their Charge in maintaining the Port, which

5 Mod. 359.
1 Salk. 248.
What Goods
are distrain-
able, what
not.

which they were bound to do, and had done Time out of Mind, and that the Custom was to distrain, (for Non-Payment of this Duty) any Goods of the Owner of such Ships which were distrainable by Law.

Then they find that this Duty was demanded of the Plaintiff, and that he refused to pay it; thereupon the Anchor, Cable and Sails were taken by way of Distress; and if those Goods were distrainable by Law, then they find for the Plaintiff, but if not, then they find for the Defendant.

And it was insisted, that those Things are not distrainable for a customary Toll, because they are absolutely necessary to the Plaintiff's Trade as a Mariner, for without them he cannot navigate his Ship.

West. c. 18.

21 H. 7. 16.

14 H. 8. 25.

2 Roll. Abr.

202.

2 Inst. 132.

3 Cro. 710.

1 Roll. Rep. Hill. *versus* Hawks. 1 Mod. 104.

That this Distress for a customary Toll ought not to be made on any Thing else, but on that Commodity out of which the * Toll is payable.

* Fitz A-
vowry, pla-
cito 192.

And lastly, that this is a void Custom, because the Charge of maintaining a Port is not a sufficient Consideration, as it would have been, if the Charge had been for maintaining a Key, which differs from a Port, because there is Cost and Charge to repair a Key, for the Defence of Ships in Time of need, but 'tis otherwise of a † Port.

† 1 Vent. 71.

Ex contra for
the Defen-
dant.

On the other Side it was argued, that since the Jury have made a special Conclusion ut supra, the Point which is the Doubt, is if the Goods in the Declaration mentioned are such which are distrainable for this Duty.

Now admitting that these Goods were Implements of Trade, and * necessary to carry it on; yet they may be distrained for any Thing to the contrary appearing in this Verdict; and the very Implements of Trade may be distrained if no other Distress can be taken; for such Implements are only † privileged at such Times when other Goods may be taken, for spare Implements of Trade, or catalla otiosa, for which there is no present Occasion for the Owner to use, those are distrainable.

* Dyer 312.

Owen 139.

Godb. 67,

110.

† 11 H. 8. 25.

Moor 214.

1 Inst. 47.

2 Inst. 133.

But Holt Chief Justice objected to the finding in this Verdict, for that the Custom which is found to distrain is general, whereas it should be found that the Use, Time out of Mind was to distrain the like Goods.

3

And

And as to the Reasonableness of the Custom, he held the Consideration to be sufficient, and that 'tis a good Custom in Law; and he cited the Case of * Malden in Essex, where there is a † customary Duty of 10d. out of every Mark of the Purchase-Money of any Borough-Lands, payable to the Borough in Consideration of their Charge in Maintaining and Cleaning the Port and Haven there, which was tried at Bar before the Lord Chief Justice Hale, and adjudged a good Custom. Adjournatur.

* Hill. 25, 26
Car. 2. B.R.
Rot. 706.
† See New
Terms of the
Law, printed
1685, where
this is called
Landcheap.

But the Cause was adjourned, and in Michaelmas, 10 Will. 3. 1698. it was argued, that this Custom (as found by the Verdict) is bold, for 'tis not shewed that any Benefit accrued to the Plaintiff in Lieu of this Duty; for tho' 'tis found that the Corporation used to repair the Port, yet 'tis not found that the Port was in good Repair, neither hath the Plaintiff any Means to compel the Corporation to repair it; and it was farther insisted, that the Things in the Declaration were not distrainable for the Reasons supra.

5 Rep.
Gray's Case.
Hob. 42.
Dyer 117.
2 Bulst. 201.
1 Roll. Rep. 1.
1 Bulst. 201.

To which it was answered, that in Dyer 117. a Ferry-boat was distrained for Rent; and no Reason can be given why a Ship in a Dock might not be distrained for the Rent of the Dock, 'tis like distraining a Cart which carries the Owner's Corn to Market; and a Cart is as much an Implement of the Husbandman's Occupation, as a Ship is of a Mariner's Trade.

Et per Holt Ch. Justice, 'Tis found that the Corporation are bound to repair, &c. the Port, which is sufficient without finding, that it was then in Repair, for 'tis the Obligation which lies on them to do the Thing, and not the Performance of the Thing it self, which is the Consideration of the Duty.

Judgment for the Defendant.

DE

D E

Term. Sanct. Mich.

Anno 7 Willielmi 3. B. R.

Hawkins *versus* Rous.

3 Mod. 389.
Libel for not
paying to-
wards a Rate
to repair the
Church and
Chancel.

Prohibition to the Consistory Court of the Bishop of Exon. where the Libel recited, that T. S. Dean rural, &c. had presented, that the Church and Chancel of D. in the City of Exon. was out of Repair, &c. and that the Church-wardens of the said Parish did make or cause to be made a certain Rate upon the Inhabitants thereof, towards the Charge of Repairing the said Church and Chancel, and that the Church-wardens had accordingly repaired the Church and Chancel, and beautified the same with Ornaments; and that Hawkins was a Parishioner of the said Parish, and refused to pay his Proportion of the said Rate.

2 Mod. 222,
254.

The Plaintiff now suggested for a Prohibition, that of common Right the Chancel ought to be repaired at the Charge of the Parson only, without any Contribution from the Parishioners.

And farther, that every Rate made for the Repair of any Parish Church, ought to be made by the Parishioners, or the greater Part of them, and not by the Church-wardens alone, without the other Parishioners.

Et per Holt Ch. Justice, By the Civil and Canon Law, the Parson is obliged to repair the whole Church; and 'tis so in all Christian Kingdoms but in England; for 'tis by the peculiar Law of this Nation, that the Parishioners are charged with the Repairs of the Body of the Church.

2

Besides,

Besides, this is one entire Rate as well for Repairing the Chancel, to which the Parishioners are not liable, as for Repairing the Church to which they are liable, so as it cannot be distinguished how much was assessed towards the Repairs of the one and the other separately.

And for these Reasons a Prohibition was granted generally to the whole Suit upon this Rate; tho' it was very much insisted on the other Side, that the Prohibition might go quoad the Rate for Repairs of the Chancel only.

Bastard *versus* Hancock in C. B. Intratur Hill.
6 Will. 3. 1482. Adjudged Mich. 7 Will. 3.

DEBT upon the * Statute of Tithes, in which the * 2 Ed. 6.
Plaintiff declared for 72 l. the treble Value, setting Debt upon
forth, that he was the lawful Proprietor of the Tithes ar- the Statute,
ising within the Parish of Lanlivery in Cornwall; and that &c. for car-
the Defendants were Occupiers of thirty-five Acres of Land rying away
within that Parish, and that they had sown so many Acres his Corn
thereof with Corn and Grain, and had carried it away without set-
without setting out the Tithes. Tithes.

Upon Nil debet pleaded, the Cause was tried at Launceston Assises before Holt Ch. Justice; and the Jury found that the Defendant Hancock debet 18 l. but quoad the other Defendants Nil debent.

And now it was moved in Arrest of Judgment, for that this Verdict had abated the Action of the Plaintiff, because 'tis an Action of Debt grounded on a Contract which is entire; and here the Plaintiff hath founded his Action upon a Contract made with three Persons, and the Jury find it quoad one of them alone.

So that the Plaintiff was mistaken in his Action, for he ought to have brought it against Hancock only, and not against the Two other Defendants, and this was compared to the common Cases in Actions upon general Contracts and Promises.

But after great Debate, the Court of C. B. in Michaelmas-Term, 7 Will. 3. unanimously resolved, that this Action was founded on a Tort, and not upon a Contract, for Non culpabilis is a good Plea to it, and therefore one may be found guilty and the other acquitted, as in other Actions upon Torts.

The Plaintiff had Judgment.

A a a

Herbert

Herbert *versus* Waters & al'.

3 Mod. 118.
1 Salk. 205.

* 43 Eliz.
c. 2. par. 19.

Writ of In-
quiry grant-
ed after a
Nonsuit in
Replevin,
where the
Defendants
avowed as
Overseers of
the Poor to
inquire of
the treble
Damages.

IN Replevin, &c. the Defendants avowed the Taking, &c. as Overseers of the Poor of the Parish of H. in the general Form, according to the Direction of the * Statute.

The Plaintiff replied *de injuria sua propria absq; tali causa*, as the Statute likewise prescribes.

And at the Trial the Plaintiff was nonsuit, and thereupon the Jury was discharged without any Inquiry of the treble Damages given to Officers by the Statute *supra*.

And now it was moved, that the Avowants might have a Writ of Inquiry awarded to supply this Defect; and after much Debate it was granted, (*viz.*) to enquire of the Damages sustained by the Defendants; and the Difference is this,

ff. Where the Matter omitted to be inquired by the principal Jury is such as goes to the very Point of the Issue; and upon which, if 'tis found by the Jury, an Attaint will lie against them by the Party, if they have given a false Verdict; there such Matter cannot be supplied by a Writ of Inquiry, because thereby the Plaintiff may lose his Action of Attaint, which will not lie upon an Inquest of Office.

10 Rep. 118.
1 Roll. Rep.
272.
2 Roll. Rep.
112.
Plowd. 408.
Cro. Car.
143.
Dyer 135.
Sid. 380.

But where the Matter, omitted to be inquired by the principal Jury, doth not go to the Point in Issue, or necessary Consequence thereof, but are Things merely collateral, as Damages are in this Case, and the four usual Inquiries on a Quare Impedit, such may be supplied by a subsequent Writ of Inquiry, without any Damage to the Party; because if the same had been inquired into by the principal Jury, it would have been (as to those Particulars) no more than an Inquest of Office, upon which an Attaint will not lie.

Stephens *versus* Squire. Intratur Pas. 7 Will. 3.
Adjudged Mich. 7. postea.

3 Mod. 205.
S. C. but
upon another
Point.

Privilege of
an Attorney
not well
pleaded.

AN Action on the Case was brought against the Defendant, who was an Attorney of Clements Inn, who pleaded his Privilege thus:

ff. Et prædict. Arthurus in propria persona sua dicit quod ipse est & prædicto tempore exhibitionis Billæ ipsius Thomæ Stephens fuit un. Clericorum Tho. Winford Ar. un. pronotar.

pronotar. Curia Domini Regis de Banco apud Westm. in Com. Midd. in officio suo quotidie intenden. and concluded with an Averment generally without annexing any Title of Privilege to his Plea.

To this the Plaintiff demurred generally, and two Objections were made to this Plea.

(1.) For that the Defendant did not say venit as well as dicit, so he was not in Court when he pleaded.

(2.) For that he hath not laid any Visne, so as the Fact of his being a Pronotary's Clerk might be tried, for 'tis a Matter issuable, and the rather because the Defendant hath not shewed any Matter of Record to prove his Privilege.

Et per Curiam, both the Objections were allowed, and the last was fatal, because this is Matter of Fact triable by a Jury, for Pronotaries Clerks are not enrolled, wherefore 'tis necessary to lay a Visne in this Plea.

Judgment for the Plaintiff, (viz.) that the Defendant answer over.

Bowers *versus* Cook.

DEBT against the Defendant as Executrix of John Cook her late husband.

The Defendant pleaded in Abatement that John Cook in the Bill mentioned, died on such a Day and Place Intestate, and that afterwards the Ordinary of that Place granted Letters of Administration to her of the said Intestate's Goods, &c. prætenu quarum she had administered several Goods which were the Goods of the said Intestate, in quo casu the Plaintiff ought to name her Administratrix, and not Executrix, & hoc parat' est verificare, &c. and then concludes thus:

¶ * Unde ex quo she was not named Administratrix in the Bill, petit judicium si ipsa ad Billam prædictam respondere compelli debeat, &c.

And upon a Demurrer to this Plea, the Objection was, that the Defendant ought to Traverse, absque hoc, that she had administered as Executrix.

Sed per Curiam, The Plea is better without such Traverse, for if the Truth was, that the Defendant had administered in her own Wrong before Administration was actually granted to her, that Matter ought to come in by way of Replication by the other Side, as it is in the Cases cited in the * Margin.

A a a 2

But

3 Mod. 136, 143.

1 Salk 298.

by the Name Powers *vers.* Clerk.

Debt against an Executrix, when she was Administratrix.

See Yel. 115.

2 Vent. 178.

Such Plea without a Traverse and Replication as here, and held good.

* This is in Bar.

Traverse where not necessary.

* 3 Leon. 197.

3 Cro. 102,

365.

3 Bulst. 250.

3 Cro. 810.

But Holt Chief Justice objected against the Conclusion of this Plea, which being a Plea in Abatement, ought to be *petit judicium de Billa & quod Billa' ill cassetur*; but the Conclusion *supra* is proper only to a Plea in Non-ability of the Person, or to the Jurisdiction of the Court, and for this Reason only, Judgment was given against the Defendant, *Quod respondeat ouster*.

Page *versus* Stedman.

Coparceners cannot sever, but must join in an Avowry for Rent.

IN Replevin, &c. for taking 500000 Bricks in a Place called Walsfield in the Parish of St. Pancras in Middlesex.

The Defendant made Conusance as Bailiff of John Bennet, Esq; and Grace his Wife, for that Simon Bennet, Esq; was seised in Fee of the Place where, &c. and that 10 Decemb. ann. 33 Car. 2. he made a Lease thereof (amongst other Things) unto Thomas Griffith for Forty-four Years, rendying 180 l. Rent every Year; that afterwards the said Simon Bennet died seised of the Reversion, which descended to the said Grace, and to Frances Countess of Salisbury as Daughters and Heirs of the said Simon Bennet; that afterwards the said Grace intermarried with John Bennet, and because 45 l. one Shilling of 90 l. of the said Rent for one half Year ended at Mich. ann. 6 W. & M. to the said John and Grace, in Right of the said Grace, *præd' tempore quo, &c. retro fuerunt & minime solut'*, the Defendant, as Bailiff of the said John Bennet and Grace his Wife, made Conusance for the said 45 l. one Shilling of the said 90 l. &c.

To this Conusance the Plaintiff demurred.

Curia.

Et per Curiam, the Conusance is ill, because Coparceners cannot sever, but must join in Avowry for Rent; therefore the Defendant in this Case ought to have made Conusance for the whole Rent as Bailiffs to both Sisters.

So where one Sister distrains, she must avow in her own Right, and also as Bailiff to her other Sister for the entire Rent, and not for a Shilling only in her own Right.

The Plaintiff had Judgment.

D E

Term. Sanct. Hill.

7 Willielmi 3. B. R.

*Inhabitants of Wotton Rivers versus Inhabitants
of Marlborough in Wilts.*

MOVED to quash an Order of two Justices of the Peace for the Settlement of a poor Person, &c.
(1.) The first Objection was, That the Order recited, that upon Complaint made concerning the Person, &c. they had so ordered, &c. and it did not appear by the Order who it was that made the Complaint; and the Justices of Peace have no Power to remove any Person, but upon the Complaint of the Churchwardens and Overseers of the Poor; and therefore it ought to be so expressed in the Order to give them Jurisdiction.

(2.) It was not alledged in this Order, that the Person removed, &c. did not rent 10l. per ann. in the Parish from whence he was removed, for if he did, he is not removeable, tho' he is likely to be chargeable.

To the first of these Objections it was answered, That admitting 'tis necessary, that it should appear the Order was made upon the Complaint of the Churchwardens and Overseers of the Poor; yet that Defect was helped by the special Return of the Certiorari by the Justices in the Caption, &c. where 'tis expressly alledged, that the Order was made upon the Complaint of the Churchwardens, &c.

And as to the other Objection it was answered, That upon Search in the Crown-Office, most of the Orders of Settlement there filed are without Allegation of not renting

5 Mod. 149.

S. C.

2 Salk. 421.

S. C.

Order of
two Justices
for the Re-
moval of a
poor Person
must be
made upon
Complaint
of the
Churchwar-
dens and O-
verseers of
the Poor.

ing 10 l. per ann. and yet a great Number of them were confirmed by this Court.

Curia.

But after several Debates it was resolved per Curiam, That the last Objection of not renting 10 l. per ann. was not material, especially because of the Precedents mentioned ut supra, so that this Order was quashed upon the first Objection only.

For per Curiam, 'tis absolutely necessary, that in the Body of the Order it should be expressly shewn, that it was made upon the Complaint of the Churchwardens and Overseers of the Poor, for otherwise the Justices have no Authority to make it.

And the special Caption made upon the Return of the Certiorari could not help the Defect in the Body of this Order, for that ought to be sufficient of it self.

The King *versus* Gately.

5 Mod. 138.
2 Salk. 471.
The Justices
Power to
discharge
Apprentices.

AN Order of Sessions was made in Middlesex to discharge one Green a Surgeon's Apprentice from his Master for not instructing him the said Green in the Art of Surgery, but Gately the Master being a Mountebank kept the Apprentice for a Cumbler on the Stage.

It was insisted against this Order, that the Justices of Peace had no Jurisdiction in this Matter, because a Surgeon is not one of the Trades mentioned in the Statute 5 El. and the Justices have Power only over such Apprentices who are bound to the Trades therein named, and not over the Apprentices to other Trades.

And Mr. Luckener's Case of Suffex was cited, which was, Two Justices made an Order to compel him to pay his and his Wife's Coachman's Wages; which Order for that Reason was quashed.

* 1 Sand.
313.

On the other Side the Case of * Hawksworth and Hilary was cited, where the Order was for discharging a Merchant's Apprentice, which is not named in the Statute 5 Eliz.

To which it was reply'd, that in that Case it might be agreed upon drawing the Order not to insist on that Point, but only upon the Power of the Justices discharging an Apprentice upon his own Default.

And after several Debates, this Order was discharged upon the Point of Jurisdiction objected, &c.

But

But some of the Justices who made this Order, being Lawyers, were very much inclined to have it quashed, because this Apprentice, who had procured himself to be discharged from his Master for not teaching him the Art of Surgery, immediately afterwards became a Tumbler to another Mountebank, so that it appeared he had only a Mind to change Masters, but not Trades.

Walker & al' *versus* Stokoe. Judgment was given 31 January, Anno 7 Will. 3.

ERROR of a Judgment in C. B. in an Action of Trespass brought by Stokoe against Walker, and four other Defendants; and a Verdict for Stokoe, and Judgment there entered against all the five Defendants.

5 Mod. 16, 69. Amendment not granted where 'tis to reverse, and not to affirm a Judgment.

And now Walker, and three more of the five Defendants brought this Writ of Error, and assigned for Error, that one of the five Defendants, against whom Judgment was entered, died before the Verdict, but they did not conclude this Assignment of Error in Fact with hoc parati sunt verificare.

Wherefore the Defendant in Error pleaded In nullo est erratum generally, and afterwards the Plaintiffs perceiving their Mistake, moved the Court to amend, by adding the Averment supra, (viz.) hoc parati sunt verificare.

But after Debate it was denied to amend it, because it was not to affirm but to reverse a Judgment.

Then the Plaintiffs moved to quash their own Writ of Error, because it was brought only in the Names of four Persons, when it appeared by the same Writ, that the Judgment was joint against five Defendants, and the Writ did not set forth that the fifth was dead, for which Reason it was ill, because all the Defendants must be joined in a Writ of Error, and if any refuse, they must be afterwards sequestered.

Where the Judgment is joint against Five, the Writ of Error must be brought by all of them.

And it was agreed by all, that this Writ of Error was ill for the Reason supra, but then it was much insisted on by the Counsel for the Defendants in the Writ of Error, to have this Matter amended by the Instructions to the Curfior who made out the Writ; who being ordered to attend, produced his Instructions given by the Plaintiffs in Error, to this Effect:

ff. I. Stokoe *versus* T. Walker, & B. C. D. & E. naming the Plaintiffs and the Defendants in placito transgressionis.
Make

Make a Writ of Error for the Defendants: Note, The Defendant E. is dead.

And now it was insisted, that this is such an Instruction that the Curator, ex officio, ought to take Notice of it, and to shew the Death of E. in the Body of the Writ of Error, and therefore the Omission of it was but *Vitium Clerici*, and amendable.

Econtra.

To which it was answered, that this was the Ignorance of the Curator, and a Mistake of his Pen, for it may be, that he did not know the Law, that it was necessary to alledge the Death of E. in the Body of the Writ; he might think it sufficient that the Writ was only in the Name of the Survivors, for that his Instructions did not direct him to express the Death of E. in the Writ, but only to take Notice that E. was dead; but if he had made the Writ as well in the Name of E. as of the Survivors, then he had not pursued his Instructions.

And it was argued farther, that a Writ of Error was not amendable in any Case, it being not within the Reason of any of the Statutes of Amendments, which are made for the Affirmance and Support of Judgments; but this Writ is to reverse a Judgment, therefore should not be favoured.

Moreover, if it was amendable, yet the Writ of a Plaintiff shall never be amended at the Instance of a Defendant against a Plaintiff who purchased it, for that would be to enforce the Plaintiff to bring such a Writ as would please the Defendant, whereas the Plaintiff should please himself therein.

Curia.

Writ of Error not amendable.

And after several Debates, it was resolved by the whole Court, that a Writ of Error is not amendable in any Case, because it goes in Reversal of Judgments.

And that if it was amendable, it could never be at the Instance of the Defendant, because the Plaintiff's Writ of Declaration, or the Defendant's Plea, shall in no Case be amended at the Prayer of the Adversary, for a Plaintiff shall not be compelled to bring his Action, or a Defendant to plead, otherwise than he himself will.

Moreover, the Defect in this Writ is fatal, and that it was not a Mistake only, but Ignorance in the Curator, in not setting forth the Death of E. in the Writ of Error, for he had pursued his Instructions as far as they led him, in that he made the Writ in the Name of the Survivors only.

Writ of Error coram vobis is no *Supplicatio*.

And hereupon the Plaintiffs prayed a new Writ of Error, coram vobis residen. which was granted; and the new Writ

Writ being allowed in Court, the Plaintiffs on another Day moved for a Superfedeas, because this Writ was not a Superfedeas of it self, as the first Writ of Error was, and a Superfedeas was granted, and the Plaintiffs put in *Bill thereon.

* *Quere*, If necessary to do.

And afterwards the Plaintiffs upon this new Writ of Error (wherein the Death of E. was alledged) did assign the same Matter of Fact for Error, (viz.) The Death of E. before the Verdict, adding the necessary Averment *Et hoc parati sunt verificare*.

Whereupon the Defendant Stokoe pleads as to C. one of the Plaintiffs in the Writ of Error, quod ipse ad breve de Errore prædicto ulterius prosequend. admitti non debet quia dicit quod post ultimam continuationem, &c. the said C. had by his Deed of Release (produced, &c.) released all Errors, &c. *Et hoc parat. &c. unde petit judicium si prædict. C. ad breve de Errore prædict. ulterius prosequend. contra scriptum ejusdem C. proprium sic ut præfertur fact. admitti debeat, &c. Et idem Ricardus Stokoe ulterius dicit quod judicium prædict. sic ut præfertur reddit. ob. Errores prædict. per prædictos (the other Plaintiffs) superius assign. revocari non debet quia dicit, that the said E. did not die before the Verdict, Et de hoc ponit se super patriam & prædict. (the other Plaintiffs in Error) similiter.*

Et quoad prædict. placitum præfat. Ricardi ad præcludend. præfat. C. ab ulterius prosequend. breve de Errore prædict. plitat. idem C. dicit quod ipse per aliqua, &c. præcludi non debet, and so pleads *Non est factum* to the Release, and Issue was taken thereon.

As to the first Issue, the Jury found, that E. was dead before the Verdict in the original Action; and as to the last Issue, they found the Release to be the Deed of C.

Whereupon the Plaintiffs in Error having entered the Issues, the Postea and Verdict upon the first Roll of the Writ of Error as they ought, they in Michaelmas-Term, 8 Will. 3. set the Cause down for the Judgment of the Court in pronouncing the Reversal of the Judgment as to them.

But then an Exception was taken on the other Side as to the Writ of Error coram vobis residen. which was in the Name of the King, reciting the Judgment to be in the Court of the King and the late Queen, before the Justices of the King and the late Queen, inter, &c.

31 Affis pl. 1.

Dy. 75. 356.

4 Leon. 107.

2 Cro. 160,

161.

Sid. 138, 139.

2 Saund. 291.

Ac recordum & processum prædict. in Curia nostra coram nobis causa Erroris intervenien. Venire fecimus & coram nobis jam residen.

And because it appeared that the first Writ of Error was quashed, upon which the Record was removed into B. R. which Writ was in the Time and in the Name of the late Queen as well as of the King; therefore this last Clause was a wrong Description; and this Writ was no Warrant for the Court to proceed thereon.

Curia.

And after several Debates, the Court in Hill. 8 Will. 3. quashed the Writ for this Reason, tho' it was insisted on, that according to a grammatical Construction, the Relatives and Verb being in the plural Number, the Clause would extend to the Queen as well as to the King; and that this Writ of Error would be sufficient without this Clause (quod fuit concessum per Curiam), yet it being to defeat a Judgment, it shall not have a favourable Construction.

Whereupon the Court was moved, that a new Writ of Error coram vobis residen. might be allowed, and also a Superseas, which was granted upon putting in Bail to prosecute, &c. tho' the Superseas was opposed, as being the third Writ of Error.

Sed per Curiam, This is the first Writ coram nobis residen. for the other Writ was void; and the Issues being found again by the Jury, ut supra, thereupon Judgment was given as to him who released, quod nil capiat per breve de Errore; and quoad the rest, that Judicium reversetur, &c.

2 Cro. 116,
117.

Jones *versus* Bodinner. Intratur Hill. Anno 7 Will. 3. Resolutio Cur. Trin. 8 Will. 3. &c.

5 Mod. 310.
1 Salk. 1. S.C.
But upon
another
Point.

T Respos for Taking one Gelding, one Mule, and five Colts at Zennen in Cornwall.

*There could
be no such
Writ of Hil-
lary-Term,
because the
Queen died
about Christ-
mas before.

The Defendant pleaded in Bar, that in Hillary-Term, Anno 6 Will. & Mar. nuper *Reginæ, a Writ issued out of the Exchequer, directed to the Sheriff of Cornwall, reciting that one Thomas Tresilian had been outlawed in the Court of Common Pleas, and that upon a special Capias Uelegatum issuing out of that Court, it was found and returned, that the said Tho. Tresilian was seised in Fee of a Tenement called Skewack in the Parish of Zennen, of the yearly Value of 30 l. and the King and Queen commanded the Sheriff to levy the Issues and Profits thereof, and to return

return the Money, a die Sancti Martini in quindecim dies tunc prox' sequen', and that upon this Writ, the Sheriff of Cornwall made a Warrant to the Defendant his Bailiff, by Virtue whereof the Defendant on such a Day before the Return of the Writ, finding the said Cattle Levant and Couchant on the said Tenement called Skewack, did there take them for the Issues and Profits of the said Tenement, and delivered them over to the Sheriffs, &c.

The Plaintiff replied, That the Defendant took the Cattle upon his (the Plaintiff's) own proper Land in Zennen aforesaid, absque hoc, that they took them upon the Tenement called Skewack, upon which they were at Issue, and the Plaintiff had a Verdict, and twenty Pounds Damages.

And now it was moved in Arrest of Judgment, That this Issue was not material to this Action, because the Defendants had by their Plea confessed the Trespass; and the Matter set out for their Justification was all void; for it was impossible that there could be any such Writ of Hillary-Term, 6 Will. & Maria, because the Queen died about Christmas before, and so all that Matter about the Writ and Warrant being impossible, it was all void; and the Defendant's Plea amounted in Effect to a plain Confession of the Action; wherefore the Plaintiff should have demurred, and not taken Issue to no Purpose.

On the other Side it was insisted for the Plaintiff, that the Defendant ought not to take Advantage of a Fault in his own Plea, and the Issue was for his Benefit.

Besides, this is only a Slip of the Clerk, and therefore amendable, for in Truth the Writ was Teste Trin. 6 W. & M. when the Queen was living; and so the Mistake was only in the Word Hillary, for Trinity, and after all, 'tis helped by the * Verdict.

Sed per Curiam, This is an immaterial Issue, for the Reason supra, and that this Mistake was not amendable, nor cured by the Verdict, and that there shall be no Repleader.

But upon the Confession of the Defendants in their Plea, there shall be a Writ of Inquiry to ascertain the Plaintiff's Damages, and for this Course the Authority of the Case between † Lacy and Reynolds was relied on.

And according to this Opinion, a special Entry was made on the Roll immediately after the Return of the Postea, thus:

B b b 2

H. Super

Ecce contra for the Plaintiff.

* Cr. El. 711.
Hob. 326,
113.
Moor 696,
697, 695.
Curia.

Writ of Inquiry to ascertain the Damages.

† Cro. El. 214.
2 Roll. Abr.
99.
1 Cro. 29.
22 Ed. 4. 46.

¶ Super quo visis & per Cur' dicti Domini Regis hic plenius intellectis omnibus & singulis præmissis præd' videtur Curia dicti Dom' Regis hic quod præd' Henricus Jones super placitum præd' Willi' Bodinoe modo & former præd' placitat' damna sua occasione transgression' præd' recuperare debeat & q'd præd' Will'us Bodinoe in placito suo præd' superius placitat' existit cognovit materiam in narratione prædict' superius allegat' & nullam sufficientem materiam in lege in Barram sive præclusionem prædict' Henrici Jones ab actione sua præd' versus eundem Will' Bodinoe placitavit Ideo consideratum est quod placitum præd' Henrici Jones superius replicando placitat' & exitus superinde inter eisdem Henricum Jones & Will'um Bodinoe junct' & processus super eundem exitum fact' nec non veredictum præd' in forma prædicta reddit' penitus evacuentur & pro nullo habeantur & quod super cognitione prædicti W. B. in placito suo prædicto ac materiis in narratione prædict' superius versus eundem W. B. per ipsum Henricum Jones allegat' prædict' Henricus Jones recuperet damna sua occasione transgr' prædict' in narratione prædicta superius specificat'.

See such an
Entry at
large in
a Roll. Abr.
99.

Sed quia Cur' dicti Dom' Regis nunc hic incognit' existit quæ damna prædict' Hen' Jones sustinuit occasione transgressionis præd' Ideo præceptum est vic' quod per sacramentum, &c.

D E

Term. Paschæ.

Anno 8 Willielmi 3. B. R.

Yeomans vid' *versus* Bradshaw.

E Lizabeth Yeomans as Administratrix of Henry Yeomans her late Husband brought an Action on the Case upon a Bill of Exchange against John Bradshaw; the Action was laid in London, and the Administratrix declared upon a Bill drawn by Bradshaw in London, upon one George Aiery of Newcastle upon Tine, and that the Bill was refused by him; whereupon Bradshaw the Drawer became liable to pay the Money according to the Custom of Merchants; and he alledged in the Declaration, that Administration was granted to her by the Vicar General, and principal Official of the Bishop of Durham, cui commissio Administrationis prædict' de jure spectabat, &c.

Debt upon a Bill of Exchange is not equal with a Debt on a Bond, but follows the Person of the Debtor.

The Defendant craved Oyer of the Letters of Administration which, were entered in hæc verba.

Quibus lectis & auditis idem Johannes Bradshaw petit judicium de Billa prædicta quia dicit quod Civitas London' prædict' semper fuit & est extra Diocesin Dunelm' prædict' infra Diocesin London' quodque ipse idem Johannes Bradshaw ad & ante tempus mortis præfat' Henrici Yeomans & semper postea hucusque fuit & adhuc est inhabitans & comorans extra Diocesin Dunelm' prædict' videl't apud London' prædict' in parochia & Warda præd' infra Diocesin London' existen' & hoc, &c.

And upon a general Demurrer to this Plea, the Question was, Whether in the Case of a Bill of Exchange (as this

*Dyer 303. a.
1 Roll. Abr.
909.
Cro. El. 472.
2 Rep. 29.
Curia.

this was) the Right of granting Administration both belong to that Ordinary of the Place where the Will was at the Time of the Death of the Intestate, as in the Case of a Bond or other Specialty; or whether 'tis no more than a Debt upon simple Contract, and so follows the Person of the Debtor where-ever he is; for if so, then the Right of granting Administration belongs to the Ordinary of the Place where the Debtor was at the Time of the Death of the Intestate, as it is held in the Cases cited in the * Margin.

Et per Curiam, This Debt upon a Bill of Exchange was not upon an Equality with a Debt upon Specialty; but is no more than a Debt upon simple Contract which follows the Person of the Debtor; and therefore this Administration is void, for this was Bona notabilia in London, and therefore the Rule was, that the Will should abate.

Harris *versus* Pett. Intratur Pasch. 8 Willi.
B. R. Rot. 173. and adjudged Trin. following.

5 Mod. 243.
Where non
damnificatus
is a good
Plea, where
not.

DEBT upon Bond, &c. the Defendant craved Oyer of the Condition, which appeared to be in the Manner following:

¶ If the above bounden Sampson Pitt, his Heirs and Assigns, do free and keep harmless the above-named Daniel Harris, his Heirs and Assigns, of, and from all such Costs and Damages as may arise against the said Daniel, by reason of a Law-Suit now depending between the said Daniel and one Phillip Couch late of Liskard Parish, that then, &c.

Hereupon the Defendant pleaded in Bar, quod prædict' Daniel ad aliquod tempus post consecutionem scripti obligatorii præd' hucusq; in aliquo modo non damnificatus fuit ratione dictæ sectæ ad legem tempore consecutionis scripti illius obligatorii dependen' inter præfatum Danielelem & Dominum Philippum Couch in conditione prædict' superius nominat' & hoc, &c.

And upon a special Demurrer to this Plea, the Plaintiff shewed for Cause, that the Defendant ought to have set forth how he had had indemnified the Plaintiff.

And it was insisted for the Plaintiff, that non damnificatus was not a good Plea, but that the Defendant ought to have pleaded in the Affirmative, and have set forth

For the
Plaintiff.

in what Court the Suit was, and what Damages had arose thereon; and the Manner how the Defendant had indemnified the Plaintiff from those Damages.

And the Reason insisted on for differing this Case from the common Cases of Counter-bonds to indemnify and save harmless, was, because in the Condition of this Bond the Word Free is added, which is of the same Signification as the Word Acquit, or the Word Discharge, and where those Words are in the Condition, there Non damnificatus is no good Plea, but it must be specially shewn how the Plaintiff was acquitted or discharged; and the Case in the * Margin was cited and relied on as an Authority in Point.

* 1 Leon. 71.
Brett *versus*
Andrews.
Gouldf. 63.
S. C.
Owen 7. S. C.

But on the other Side it was argued for the Defendant, that this Plea in the Negative was a good Plea, because the Condition of this Bond doth not refer to any certain or particular Thing from which the Defendant should free the Plaintiff, but relates only to generals, which may or may not happen; and it lies properly in the Knowledge of the Plaintiff only, Whether he had any Damages by Reason of the Suit mentioned in the Condition of this Bond.

For the Defendant.

And the Difference of these Cases is as followeth:

1. Where the Condition is, that the Defendant shall discharge or acquit, or free the Plaintiff of or from such a Bond or Rent, or Action, or from any other particular Thing ascertained in the Condition, there the negative Plea Non damnificatus is not good, because the Defendant hath undertaken to do an Act in Discharge of the Plaintiff.

3 Cro. 913,
914.
2 Cro. 638.
Co. Ent. 36,
37.
His own Opinion upon
the Case.

But where the Condition is only to Free or to discharge, or indemnify the Plaintiff from any Damage, or Cost or Trouble which shall or may happen by Reason of such Bond, Rent or Action, or other particular Thing therein mentioned; in such Case the negative Plea is sufficient, because it doth not appear that any Damage hath happened to the Plaintiff; and if no Damages hath happened then 'tis impossible that the Defendant should shew in the Affirmative the Manner how he had freed or discharged the Plaintiff, therefore it lies on the Part of the Plaintiff by Way of Reply wherein he was damaged.

Et per Curiam, Judgment was given for the Defendant, and that the Law was according to the Diversity aforesaid; whereupon the Plaintiff prayed Leave to discontinue upon Payment of Costs; which was granted.

Judicium pro Defendente.

Oldham

Oldham *versus* Pickering. Pas. 8 Will. 3. B. R.
Rot. 87.

2 Salk. 464.
An Estate
pur auter Vie
is a Free-
hold, and
not distribu-
table.

* 29 Car. 2.
cap. 3. par. 12.

Curia.

See note 2. ch. 2. p. 29.

22 & 23 Car.
2. cap. 10.

In a Prohibition, and upon a Demurrer to the Declara-
tion, the Case appeared to be, that A. (who had Lands
limited to him during the Life of B.) died Intestate, and
the Plaintiff took out Administration (B. the Cestuique Vie)
being still living; and now there being Assets sufficient, be-
sides this Estate pur auter Vie, to pay all the Debts, &c.
The next of Kin to the Intestate libelled in the Spiritual
Court against the Administrator, to have this Estate pur
auter Vie distributed, supposing the * Statute, which makes
such Estates Assets in the Hands of an Executor or Admini-
strator, had changed the Nature of the Estate, and made it
a mere Chattel in their Hands, and so subject to a Distri-
bution, as other the personal Estate of the Intestate.

Sed per Curiam, Such an Estate still remains a Free-
hold, and the Administrator is Tenant of such Freehold,
against whom the Præcipe must be brought if a Common
Recovery should be had against him of the Lands; and
the Design of this Statute was only in respect to Credi-
tors, to make an Estate pur auter Vie Assets for Payment
of Debts, and for that End only the Administrator is made
an Occupant, but in all other Respects the Quality of the
Estate remains the same as it was before at Common Law;
and the Spiritual Court never had any Jurisdiction in Cases
of Freehold.

Et per Holt Ch. Justice, Since the Statute 22 & 23
Car. 2. it hath been held, that the Statute 31 Ed. 3. cap.
11. is thereby repealed; and he held, that the Reason of
Distribution of the Intestate's Goods by the Ordinary, be-
fore the Statute 22, 23 Car. 2. was, because there was no
Property of those Goods in any Body, therefore the Ordina-
ry having the Possession, he disposed them at his Plea-
sure, for there was no Proprietor to control him.

And he doubted, Whether this Estate pur auter Vie was
subject to the Payment of general Legacies, in Case it
came to the Hands of an Executor or Occupant by Force
of the Statute 29 Car. 2. cap. 3.

Quære, Whether it shall go to the Administrator de bo-
nis non, &c. for that it is not within the Letter of the
Law; and it was made a Doubt in the Argument of this
Case.

Bands *versus* Bodinner. Pas. 8 Will. 3. B. R.
Rot. 382.

IN Trover for a Cow, &c.

The Defendant pleaded his Privilege as an Attorney of the Court of C. B.

Filing Bail
for an Ap-
pearance
doth not oust
the Privilege
of an Attor-
ney.

The Plaintiff replied, that at the Time of exhibiting his Bill against the Defendant, (viz.) On such a Day, the Defendant was in Custody of the Marshal of the Court of B. R. at the Suit of one Katharine Maddern, Widow, in a certain Plea of Trespas, and then and there the Defendant, by the Court aforesaid, Tradit. fuit in Ballivum in placito prædicto ad sectam dictæ Katharinæ Maddern prout patet per Recordum inde, &c. super quo postea scilicet eodem die, the Plea aforesaid of the said Katharine Maddern being not determined; the Plaintiff, according to the Course of the Court, Time out of Mind used and approved, exhibited his Bill against the Defendant here in Court prout ei bene licuit, & hoc, &c.

To this Replication the Defendant demurred generally, and after Debate it was adjudged Hill. 8 Will. 3. that the Matter in the Replication was not sufficient to oust the Defendant of his Privilege of an Attorney; for tho' an Attorney, or other privileged Person of the Court of Common Pleas or Exchequer, doth file a Bail in the Court of B. R. for his Appearance in that Court upon an Arrest by Process, &c. yet this doth not amount to a Waiver of his Privilege, because 'tis no more than a bare Appearance, without which he cannot plead and take the Benefit of his Privilege; and therefore he may not only plead it in the same Action, in which he appeared by filing Bail; but in any other Action upon Declarations filed against him in the same Term by the By, according to the Course of the Court.

And tho' this Filing Bail in the first Action giveth an Opportunity to others to deliver Declarations against him by the By the same Term, according to the Course of the Court of B. R. yet that Practice doth not extend to exclude such Defendant from any Advantage by Pleading to the Jurisdiction of the Court, or otherwise.

Curia.

Sed per Curiam, If the Defendant had waived his Privilege by Pleading in Chief to the first Action, and the Plaintiff in this Action had shewn that Waiver in his Replication, then the Defendant would have been ousted of his Privilege in this Action; because a Waiver of Privilege in a prior Action depending in the Court of B. R. is a Waiver in all other Actions commenced in that Term.

Bro. Tit. Bill.
pl. 6, 7, 13.
22 Aff. pl. 83.
27 H. 6. 6. 4.
2 Roll. Abr.
275.
2 Bulst. 207,
208.

Et per Curiam, If an Attorney of the Court of C. B. is in actual Custody of the Marshal of the Court of B. R. by Process; there he cannot plead his Privilege in any Action on any Bill filed against him, for if he should there would be a Failure of Justice.

So if an Attorney of C. B. is brought into the Court of B. R. at the Suit of an Attorney there, which is an Estoppel to the Defendant's Privilege, even in such Case the Defendant shall be ousted of his Privilege in all other Actions commenced against him in B. R. in the same Term, because the Jurisdiction of this Court was attached upon him by the first Action.

The Judgment was quod Billa cassetur.

Freeman *versus* Bernard. Intratur Pas. 8. B. R.
Rot. 219. and adjudged Pas. 9.

1 Salk. 69.
Award,
where 'tis ill
pleaded to
an Action.

Action on the Case upon a special Promise made by the Defendant to deliver a Parcel of Hops to the Plaintiff on such a Day and Place, on a certain Price agreed on, &c.

The Defendant pleaded in Bar, that after the Promise made, both he and the Plaintiff referred all Matters between them to Arbitration, and that the Arbitrators awarded, that the Defendant should release the Plaintiff, and that he should release the Defendant of all Actions and Demands whatsoever; and alledged, that from the Time of the Award hitherto, he was always ready, and yet is, to release the Plaintiff according to the Award, &c.

And upon a Demurrer to this Plea, after several Debates, it was adjudged, Trin. 9 Will. 3. that this Award was no Bar to the Action, because nothing was awarded but only mutual Releases from each other; so that the Award itself is no Bar, but the Thing awarded when executed would be a Bar.

And a Difference was taken where any Thing is awarded in Satisfaction, there the Award it self is a Bar before 'tis performed; but where nothing is awarded, but Releases on both Sides, there when the Award is executed, the Release will likewise be a Bar, but not before, for the Award without the Release is no Bar.

Sed per Curiam, the Defendant may bring his Action against the Plaintiff, for not releasing according to the Award, and therein ought to recover all his Damages and Costs lost in the Action against him.

D E

Term. Sanct. Trin.

Anno 8 Willielmi 3. in B. R.

Row *versus* Gatehouse. Trin. 8 Willi. 3. B. R.
Rot. 466.

IN an Action on the Case on two Promises wherein the Plaintiff declared, first, that the Defendant Row was indebted to him in 42 l. 2 s. 3 d. for Meat and Drink found by the Plaintiff, for the Defendant, and he being so indebted *super se assumpsit*, &c. to pay the Money.

Cumque etiam die & anno supradict' apud S. prædict' in consideratione quod prædict' (the Plaintiff) ad consimiles instanc' & requisitionem ipsius Antho. Row invenisset & providisset pro eodem Anthonio & aliis personis ad speciales instanc' & requisition' ipsius Anthonii al' Esculent', &c. * *super se*

5 Mod. 305.
2 Salk. 663.
Case, &c.
upon two
Promises,
where one
of them was
void.

* When it
should be
the Defen-
dant *super se*
assumpsit.

se assumpsit & eidem Thomæ adtunc & ibidem fideliter promisit quod ipse præd' Anth'us tant' denar' summas quant', &c. and so there was no nominative Case to the Verbs super se assumpsit & promisit, and by Consequence no Promise of the Defendant.

After a Verdict for the Plaintiff upon non assumpsit pleaded, and Judgment, the Defendant brought a Writ of Error in B. R. and this Matter was insisted on for Error; and that since entire Damages were given upon both Promises, and one of them was void, the * Judgment upon this Verdict was erroneous.

* 3 Cro. 913.
Noy 50.
Yel. 93, 94.
1 Leon. 170,
171.
2 Cro. 115.
1 Sid. 306.
2 Vent. 141.

Sed per Curiam, since 'tis positively affirmed at first, that the Defendant super se assumpsit, that nominative Case, (viz.) Defendens shall go to the subsequent Verbs.

Hallett *versus* Byrt. Trin. 8 Will. 3. B. R.
Rot. 23.

1 Mod. 292.
2 Salk. 580.

TRESPASS for Taking three Cows at Beomister in Dorsetshire.

Where the
Plea a-
mounted to
the general
Issue.

The Defendant pleaded specially, that the Bishop of Sarum was seised in Fee of the Hundred of Beomister in Right of his Bishoprick; and that he and all his Ancestors Time out of Mind, had an Hundred-Court of all personal Actions under 40s. and of Replevins within the said Hundred, from three Weeks to three Weeks to be held before the Free Suitors.

And that the Bishop and all those whose Estate, &c. had used Time out of Mind by their Steward of the said Hundred upon Complaint made, &c. to replevy Cattle unjustly taken at any Place within the said Hundred; and that the Bishop had demised the said Hundred unto Carleton Whitlock, Esq; for three Lives; by Virtue of which he was seised, &c. and that the Plaintiff and T. S. took those Cows, being the Cows of one E. G. at Beomister within the said Hundred, and impounded them there; and that thereupon the said E. G. complained to Henry Samway's Steward of the said Carleton Whitlock of his Hundred-Court aforesaid, of the unjust Taking the said three Cows; and that thereupon the said Steward made his Precept to the Bailiff of the said Hundred, &c. to replevy those Cows, by Virtue whereof the Defendants took them, and delivered them to the said E. G.

The

The Plaintiff demurred specially to this Plea, and shew'd for Cause, that it amounted to the general Issue Not guilty; and it being twice argued, it was adjudged 9 Pasc. Will. for the Plaintiff, and that for two Reasons.

(1.) Because this Plea in the form as it was drawn, did amount to the general Issue; for that the Defendants had not admitted by their Plea so much as a Possession of the Cows in the Plaintiff at the Time of the Taking, &c. for they say, the Cows were then impounded, which is the Custody of the Law, and not of the Party, so that the Defendants by their Plea had not given any Colour of * Action whatsoever to the Plaintiff.

* *Quare*, If the Defendants had admitted a bare Possession in the Plaintiff, whether that would have been Colour sufficient; it being but a tortious Possession only.

Et per Holt Chief Justice, If the Defendants had admitted a bare Possession, &c. that would have been a sufficient Colour for the Defendants to justify specially under the Precept si Replevin, because the Cows were expressly mentioned in the Precept, and they were commanded to take them, and therefore they might justify the Taking, &c. although the Property was not in that Person who brought the Replevin.

And no Action of Trespass will lie against the Defendants, (the Officers) for taking Goods or Cattle by Virtue of a Replevin, unless he who hath the Possession, claims a Property when the Officers come to demand them, and they take them notwithstanding such Claim of Property; and this special Matter must come in by way of Replication by the Plaintiff.

Trespass will not lie against the Officers for replevying Goods.

And so there is a Difference between a Replevin and another Process of Law, with Respect to the Officers; for in the first Case, (viz.) in Replevin, they are expressly commanded what to take in Specie; but in Writs of Execution, the Words are general, (viz.) To levy of the Goods of the Party, and therefore 'tis at their Peril if they take another Man's Goods, for in that Case an Action of Trespass will lie.

(2.) This Prescription for a Steward of an Hundred Court to grant Precepts of Replevin out of a Court upon a Parol Complaint made to him, is a void Prescription, and against Law; for even the Steward himself hath no such Power by the Common Law, but his Authority

Prescription for a Steward of an Hundred to grant Replevins on Parol, not in good.

* Cap. 21.

† Cap. 17.

1 Inst. 145.

2 Inst. 139,
140.

In that Matter is given to him by the Statutes of * Marlbridge, and † Westm. 1. and those Statutes do not extend to any other Person, but the Sheriff only; and if the Sheriff who is Steward of the County Court had no such Power at Common Law, it follows that the Steward of an Hundred Court which is derived out of the County Court cannot have any such Power as to grant Replevins out of Court.

3 E. 4. 34. a.

But it was agreed, that the Hundred Court, and other Courts of Lords of Manors may by Prescription hold Plea in Replevin, and so may incidently have Power to replevy Goods or Cattle taken; but that must be by Process of the Court after a Plaint entered, but not by a Parol Complaint * out of Court.

* Co. Ent.

294. a.

Dyer 245,

246.

F. N. B. 73.

Nota; All Plaints in Replevin in any inferior Court which hold Plea therein by Prescription must be in the Sheriff only, because the Goods, &c. are not replevied, but by Process subsequent to, and grounded on the Plaint.

Bennett *versus* Talboys.

1 Salk. 212.
Where the
Conclusion
of a Decla-
ration *contra*
formam sta-
tuti is good,
where not.

TRespass for breaking his Close, treading his Grass *pedibus Ambulando*, and eating his Grass with Cattle mentioned in the Declaration.

Necnon de eo, That the Defendant hunted in the said Close, being an inferior Tradesman, (*viz.*) a Clothier, & alia enormia, &c. & contra pacem dicti Dom' Reg' nunc, &c. & contra formam statuti in hujusmodi casu edit. & provis'.

After a Verdict for the Plaintiff, and 2 d. Damages given by the Jury on the Trial at Sarum Assises, it was moved in Arrest of Judgment, that the Conclusion of this Declaration, (*viz.*) *contra formam statuti* went to the whole; whereas the first Part of the Declaration was for a Trespass at Common Law, and not grounded on any Statute whatsoever.

Curia.

And after several Debates it was ruled, Pasch. 9 Willi. that the Plaintiff should have his Judgment; for per Curiam, these Words *contra formam statuti* shall be applied to that Part of the Trespass which was grounded on the New Statute against Hunting by inferior Tradesmen, which gives full Costs, tho' the Damages are under Forty Shillings.

Et

Et per Holt Ch. Justice, 'Tis sufficient to lay in the Declaration, that the Defendant hunted in the Plaintiff's Ground, without concluding contra formam Statuti, for that should come in Evidence.

The King *versus* Ingram & al'.

Several Persons were convicted of a Riot by Inquisition taken before two Justices, upon the * Statute of H. 4. which Inquisition was traversed, and a Verdict found against the Defendants; and upon a Motion in Arrest of Judgment, the Exceptions were,

I. This Conviction was before the Justices of Peace only, and not before the Sheriff, who by the express Words of the Statute must be joined in the Certificate of the Fact to this Court, and consequently it must be intended, that he ought to be present, for otherwise how can he certify the Fact; and so much also may be collected to be the Intent of the Statute * 19 H. 7. upon Construction of the whole Statute.

2 Salk. 592.
* 13 H. 4. c. 7.
In what Cases the Sheriff ought to be present upon the Conviction for a Riot.

* 19 H. 7.
cap. 13.

Sed non allocatur; For neither of those Statutes appoint, that the Sheriff should be present at the Taking the Inquisition by a Jury; for the Difference is,

II. Where the Conviction of a Riot is made on the Statute 13 H. 4. upon View only, there the Presence of the Sheriff or Under-Sheriff must be necessary; but 'tis not so where the Conviction is upon an Inquisition taken after the Riot is ended.

Raym. 386.

(2.) Obj. (viz.) It appears that two Inquisitions were taken of this Riot; it appears also that the whole Fact was done before the Taking the first Inquisition, and therefore the Inquiry ought not to be partial, but the Whole should have been found upon the first Inquisition.

Sed non allocatur; There being nothing in this Objection.

(3.) Obj. (viz.) That the Jurors, upon the Enquest are charged only ad inquirendum pro Domino Rege, without saying, Et pro Corpore Comitatus, or juxta formam Statuti.

Sed per Curiam, 'Tis well enough without it,

(4.) Obj. (viz.) That the Fact was found, not only Vi & armis, but also Manu forti, of which the Justices had no Power to inquire by those Statutes.

Sed

Sed non allocatur.

Inquisition
may be taken
after the
Month.

* 13 H. 4.

Sid. 186.
The King
versus Collins.

Dyer 210. b.
1 Sid. 186.

(5.) Obj. (viz.) That appears by the Record, that the Fact was done more than one Month before the Time of the Taking the first Inquisition; and then the Time which the Statute allows being lapsed, the Justices have afterwards no Power to take the Inquisition, because the Statute is express, that the Inquiry shall be made within a Month after the Riot is committed; besides, the Justices have no Power to take such Inquisition any where but in their Sessions.

To this it was answered, that 'tis very true, the Statute is mandatory, (viz.) That the Inquisition shall be taken within a Month, under a Penalty in the neighbouring Justices; but after the Month 'tis still discretionary in the Justices to take an Inquisition, &c. and that by Construction of the last Clause of the Statute 13 H. 4. and it hath ever been the Practice to take such Inquisitions out of Sessions.

The Defendants were fined.

The King *versus* Thorp & al'.

5 Mod. 221.
Guardian-
ship by the
Father con-
tinues till his
Son is 21
Years old in
Respect to
his Body, but
not to his
Lands.

THIS was an Information in Nature of a Conspiracy against Thorp the Gaoler of Winchester, and others, for procuring a Marriage between Edward Mitchell and Cornelia Holton; and the Charge against the Defendants was, that Edward Mitchell being a Scholar at Winchester-School, the Defendants did entice and persuade him to leave his Father, and to come to Thorp's House, and there did procure and compel the said Edward Mitchell to drink strong Liquors, and to be drunk, and then did introduce the said Cornelia Holton (a Person of ill Fame, and worth nothing) into the said Mitchell's Company, and by false Speeches did procure the said Edward Mitchell to marry the said Cornelia Holton.

The Defendants were found guilty of all, except compelling the said Mitchell to be drunk.

And now it was objected in Arrest of Judgment, that the Matter for which the Defendants were convicted, was not a Crime within the Law of the Land, for 'tis a lawful Act for any Man to procure a Marriage between Persons of lawful Age to marry; and in this Case Edward

Mitchell was more than fourteen Years old; and that there is no more Reason to maintain an Information at the Instance of the Father of this young Man, than for him (the Father) to maintain an * Action for the Loss of the Marriage of his Son, which (as it hath been adjudged) will not lie.

* 3 Cro. 55.
1 Leon. 50.
W. Jones 411.
Raym. 239.

(2.) Obj. Since the Gift of this Information consists in the unlawful Means used by the Defendants in procuring this Marriage, therefore it should specially and particularly be set forth in the Information what those unlawful Means were, that the Court might judge whether they were so, or not.

And as to the Enticing him to leave his Father, he (the Son) was of sufficient Age to make his Election, whether to stay with him (his Father) or not; and as to the Enticing him to Thorp's House, it doth not appear but that the School-master gave him Leave to go thither.

On the other Side it was argued, that the Procuring a lawful Act to be done by any unlawful Means and wicked Practices, is an Offence punishable by the Law; and to prove that Matter, the Cases in the * Margin were cited.

Ecce contra for the Plaintiff.

* Raym. 474.
1 Vent. 234.

Et Adjournatur.

And afterwards, in Michaelmas, 9 Will. 3. it was argued again for the Defendants, and insisted, that all Guardianships whatsoever (excepting only in Chivalry) determine at the Infant's Age of fourteen Years, that being the only Guardianship which continues to his Age of twenty-one Years, which is upon a particular Reason:

For the Defendants.

1. Because till then the Infant is not capable of performing Knights-Service.

8 Ed. 4. 8.
Litt. §. 103.
108, 114.

On the other Side it was argued, that this was a great Offence, and that also in Respect to the Father, because every Father hath a Right of Guardianship of the Body of his Son and Heir, until he attain the Age of twenty-one Years; and to prove it, the Cases in the * Margin were cited.

For the Plaintiff.

* 9 Ed. 4. 53.
27 Assise, pl. 73.
33 H. 6. 55.
Litt. §. 114.
1 Inst. 84.
Rast. Entr. 263.

That when Censures of Knights-Service were in Being, the Guardian in Chivalry could not have the Custody of the Body on the Marriage of the Ward as long as his Father was living; but all which such Guardian could have was the Custody of the Lands which were descended to the Infant from his Mother, or other collateral Ancestor.

1 Inst. 73.
Fleta, lib. 1, 13.

D d d

Now

Cro. Eliz.
769.
Sid. 387.

Now the true Reason of Guardianship is not with Respect to the Benefit of the Lord by Tenure, but with Respect only to the good Education of the Infant.

And there is a Difference between an Action on the Case brought by the Father Quare filium & heredem suum rapuit, and an Information, as here, for the later is to punish the Offence, but the first is to recover Damages.

Et per Holt Ch. Justice, The true Reason why by the Law of England the Father hath not the Guardianship of his younger Children is, because by our Law the younger Children cannot inherit any Thing from their Father.

That the Guardianship of the Father, which is a Guardianship by Nature, continues till the Son and heir apparent attain to the Age of twenty-one Years, but that is with Respect to the Custody of the Body only.

No Judgment.

Prince *versus* Moulton. Trin. 8 Will. 3. B. R.
Rot. 215. Adjudged Pas. 9 Will. 3.

2 Salk. 663.
Where entire
Damages for
a Thing
which in it
self is im-
possible.

TRESPASS, &c. wherein the Plaintiff declared, that upon the second Day of July, Anno 5 Will. 3. &c. and from thence to the Time of the Action, he was possessed of two Meadows adjoining to a River, and that the Defendant the 2d of August, in the same Year, exalted his Mill-banks to that Degree, that thereby the Water overflowed his (the Plaintiff's) Meadows, per quod he lost the Use and Profit of his Meadows, from the said second Day of July unto the Time of the Action, &c.

1 Vent. 103.

Upon Not guilty pleaded, the Plaintiff had a Verdict and entire Damages; and it was moved in Arrest of Judgment, for that the Damages being entire, the Plaintiff hath recovered Damages for that which in it self is impossible, for in his Declaration he laid the Cozt, (viz. The Exalting the Mill-bank) to be done on the second Day of August, and yet he alledged, that he lost the Use and Profit of his Meadows from the second Day of July before, which could not be by exalting the Mill-bank; for that was not done till the second Day of August following; so the Jury having given Damages for the Whole, as the Plaintiff had laid it, the Judgment ought to be set aside.

But on the other Side, the Case of * Bridges and Horner was cited, which was Trespass with a Continuando from a Day before the original Trespass laid in the Declaration, and entire Damages given, but upon a Motion in Arrest of Judgment, it was held good, because it was impossible that a Trespass should be continued before it began, and the Jury could not have any Consideration of that Time.

Econtra.
* See antea.

1 Roll. Abr.
577.
Allen 22.
Simms *versus*
Gregory.

Holt Chief Justice. The Plaintiff hath laid, that he lost the Use as well as the Profits of his Meadows for all the Time; now 'tis possible, that he may lose the Profits, for all the Time, because the Meadows might be matted up for a Cut of Hay; but he could not lose the Use before the Fact done.

And after several Motions, the Judgment was arrested chiefly upon the Authority of † Harbin's Case, which was; H. Case, &c. for not grinding his (the Defendant's) Corn at the Plaintiff's Mills, and derived his Title under a Lease made to him, &c. 11 Jac. then sets forth, that the Defendant at several Times from 2 Jac. to 12 Jac. did grind his Corn elsewhere, the Plaintiff had a Writ, but could never get Judgment, because the Damages were assessed for all that Time, (viz.) from 2 Jac. to 12 Jac. when the Plaintiff's Lease commenced, 11 Jac. and not before; so that Damages were given to the Plaintiff before he had any Title.

† Harbin *versus*
Green.
Hob. 189.
S. C.
Moor 887.
S. C.

D E

Term. Sanct. Mich.

Anno 8 Willielmi 3. B. R.

The King *versus* Hornely and Williams.

* 31 El. c. 1.
16 Car. 2.
cap. 2.

IN the Court of Exchequer-Chamber for reversing a Judgment given in the Court of Exchequer, according to the Statute * 31 Ed. 3. cap. 12. in the great Case of the Bankers of London, to whom Part of the Revenue of Excise was granted by King Car. 2. for Payment of perpetual Interest for the Sum of 600000 l. lent to him.

The Lord Keeper Somers did then declare, That the Question had been put to all the Judges of England, Whether the Judgment of that Court ought to pursue the Opinion of the Majority of the Judges, and he said the Judges had delivered to him their Opinions in Writing.

H. Holt Chief Justice, Powell and Eyre Justices were of Opinion, that the Majority of the Judges should govern this Judgment.

But the Chief Justice Treby, Chief Baron Ward, Nevell Rokeby, Turton, Letchmere and Powis were of a contrary Opinion; and therefore the Lord Keeper pronounced a Reversal of the Judgment in the Court of Exchequer merely upon his own Opinion, and of Treby Chief Justice, and Baron Letchmere against the Opinion of all the rest of the Judges.

Blackall *versus* Eale. Acton *versus* Eundem.

UPON a Motion in Arrest of Judgment after a Verdict for the Plaintiffs, the Cases appeared to be, Where an impossible Day was laid in the Declaration, it was cured by a Verdict. (viz.) The first was a common Action of Battery brought by Blackall, who was Servant to Acton the Plaintiff in the other Cause; and the second was an Action brought by the said Acton the Master, for the Battery of his Servant Blackall, per quod servitium amisit.

The Declarations were of Easter-Term, ann. 8 Willi. and in both the Fact was laid to be done on the first Day of February, ann. 8 Will. which was a Day not yet come, and possibly might never come, for that the King began his Reign on the 13th Day of February; and therefore the first Day of February, in the 8th Year of his Reign, will not be till February next, if the King happen to live so long, so that it was impossible such Facts should be done in the Manner as the Plaintiffs had declared; therefore by the Plaintiffs own shewing they had no Cause of Action at the Time of those Actions brought.

To which it was answered, that these Cases were not like the common Case wherein it appears, that the Plaintiff commenced his Suit before the Cause of Action did arise; because here the Time as 'tis laid appears to be impossible, and so 'tis no more than a Declaration, laying a Fact without mentioning a Day when it was done, for an impossible Day is the same with no Day; and if the Defendant had demurred to these Declarations, they would certainly have been adjudged ill.

But he having pleaded to Issue, and a Verdict against him, the Defect is cured by that Verdict, for 'tis a Rule, that a Verdict helps every Thing which is necessary to be proved upon the Trial, and without Proof of which no Verdict could be given for the Plaintiff; wherefore in these present Cases, unless the Plaintiffs had proved the Battery to be done before that Time, it was impossible for the Jury to find the Defendant guilty, and the certain Day is no longer material since the Defendant is found guilty of doing the Fact; and now it shall not be intended, that it was done at any Time after the Action brought.

And

* Between
Lewin and
Serral.
Mich. 26.
Car. 2. in
B. R. in
Point.

And a * Case was cited, which may be seen in the Margin where an impossible Day was laid in the Declaration ut supra, and held good after a Verdict.

Wherefore the Plaintiffs had their Judgment.

Linsey versus Sir Talbot Clerk.

In Actions vi
& armis the
Capiatur
need not be
entered by
the Statute.

THE Plaintiff had a Verdict in Ejectment upon an Original in B. R. whereupon a Writ of Error was brought in Parliament; and now to prevent Error, it was moved to have the Opinion of B. R. upon the New Statute 3 & 6 W. & M. (which takes away the Capiatur Fine in Cases of this Nature) whether since this Statute any Judgment, quod Defend' capiatur ought to be entered on Record of Judgments in Actions vi & armis, &c. or whether any other special Entry ought to be made in lieu thereof, and taking Notice of the Statute.

Curia.

And after Debate it was held per Curiam, that this New Statute having taken away the Fine; therefore no Judgment of Capiatur shall be entered against the Defendant, nor any Thing in lieu thereof; but that Clause shall be totally left out of the Judgment.

*Patrick versus Balls. Mich. 8 Willi. 3. B. R.
Rot. 200. but adjudged Hill. 8.*

In Eject-
ment, the
Plaintiff de-
clared on a
Demise
made by a
Corporation,

and did not set it forth by Deed, or under the Common Seal.

IN Ejectment in C. B. the Plaintiff declared upon a Demise made to him by the Aldermen and Burgesses of Bury St. Edmund in the County of Suffolk, and did not set forth that it was by Deed, or under Seal of the Corporation.

† 2 Cro. 613.
Swadling ver.
Piers.

Upon Not guilty pleaded, the Plaintiff had a Verdict and Judgment; and thereupon a Writ of Error was brought in B. R. and the Error insisted on was, that this Demise was void, because a Corporation aggregate can do nothing but by Deed under their † Common Seal, and the Case in the † Margin was cited as a parallel Case, for that was an Ejectment for Tithes, and a Verdict for the Plaintiff; but the Judgment was arrested, because the
Plaintiff,

Plaintiff had not declared upon a Demise by Deed, for Tithes will not pass without a Deed.

Sed per Curiam, Since that Case in 2 Cro. aforesaid, the Law is altered as to this Point concerning Declarations in Ejectment, for now they are grounded on Fictions only. The Judgment was affirmed.

Gillam *versus* Harnage. Mich. 8 Will. 3. B. R.
Rot. 197.

ERROR of a Judgment in the Court of Marshalsea, and afterwards a Sci. fa. was brought against the Bail, wherein it was recited, that the Judgment was in the Marshalsea-Court, Quod quidem Recordum certis de causis coram nobis Venire fecimus, and upon Motion this Writ was quashed, because by the Form of it, videlicet certis de causis, the Record was removed by Certiorari, and they shall not make use of this Court to execute the * Judgments of other Courts, unless they are affirmed here on a Writ of Error.

B. R. will not execute the Judgments of inferior Courts, unless affirmed on a Writ of Error.

* Holt. 117.
1 Sid. 413

Wherefore the Plaintiff brought a new Writ of Sci. fa. altho' the Truth was, that the Record came hither by Writ of Error, but then the Sci. fa. should recite thus, (viz) Quod quidem Recordum coram nobis causa Erroris corrigend. Venire fecimus.

DE

D E

Term. Sanct. Hill.

8 Willielmi 3. B. R.

Hicks versus Woodeson. Adjudged Hill. 8.

Libel for
Tithes of A-
gismment for
Cattle, a
Custom was
suggested.

THE Plaintiff Woodeson, Rector of Huntspill, within the Hundred of Huntspill in the County of Somerset, libelled in the Spiritual Court against Hicks, for the Tithes of Agismment of Cattle, not used for the Plough or the Pail.

And Hicks moved for a Prohibition upon a Suggestion of several Modus Decimandi as to other Demands of Tithes, and as to the Agismment of Cattle, he suggests a Custom Time out of Mind, within the Hundred of Huntspill, that no Tithes were ever paid to any Rector or Vicar of any Parish within that Hundred, for the Agismment of any Cattle not used for the Plough or Pail.

And hereupon a Prohibition was granted, and the Plaintiff declared upon this Custom in non Decimando, which (amongst others) was put in Issue; and it was at Wells, Summer Assizes, Anno 1695, where the Jury found the Custom as the Plaintiff in the Prohibition had laid it.

Selden 136,
407.
Hob. 295.
2 Bulst. 285.
Herley 111.
13 Rep. 13.

But notwithstanding this Verdict, Woodeson moved for a Consultation as to so much which concerned the Agismment of Cattle, alledging, that this Custom in non Decimando was void, for that no Prescription or Custom could establish a Non Decimando.

Et per Curiam, 'Tis a bold Custom, and so a Rule was given for a Consultation, nullo habito respectu to the Verdict.

Custom in
Non Deciman-
do, not good,
unless 'tis for
Tithes of
Wood.

And in arguing this Case, it was much insisted on, as well by the Court as the Defendant's Counsel, that there is not any Case to be found in the Books, of a Custom in non Decimando, excepting for Wood in the Wolds of Kent and Sussex, which was no Authority for allowing such a Custom as to any other Thing, which was titheable of common Right.

For per Curiam, Wood is not titheable of common Right, being Part of the Freehold, but 'tis titheable by Custom only; quod nota.

1 Roll. Abr.
653.
1 Roll. Rep.
22.
March 25.
1 Sid. 321,
361.
Litt. Rep.
151.

For if Wood is titheable only by Custom, and not of common Right, then all the Libels for Tithes Wood ought to be founded on the Custom alledged; and if so, then there could be no Suggestion of a Modus Decimandi against a Libel for Tithes Wood, for it would be absurd to suggest one Custom against another, for one and the same Thing; for if the Duty arises by Custom only, it cannot be discharged by another contrary Custom; and yet many such Modus's have been allowed against Libels for Tithes Wood. Ideo quare.

The King *versus* Rees.

MAndamus to the Archdeacon of St. Asaph, to swear Rees a Church-warden of the Parish of, &c. with- in his Archdeaconry, for the Year ensuing, he being duly elected by the Parishioners, &c. according to Custom there used Time out of Mind.

5 Mod. 325.

The Archdeacon, in his Return to this Mandamus, confessed the Custom, and that the Right of Election was in the Parishioners, and that Rees was elected and nominated Church-warden according to the Custom.

Then he certified, that this Rees was a poor Dairy-man, and had no Estate, and that he was persona minus habilis & idonea for that Office, therefore he refused to swear him.

Sed per Curiam, A peremptory Mandamus shall go, for an Archdeacon hath no Power to refuse the Swearing a Church-warden, who was duly elected and nominated according to Custom.

Lisle's Case.

1 Salk. 60.
Proceedings
in an Appeal
for Murder.

Lieutenant Lisle was indicted at the Summer Assises at Carlisle, for the Murder of one Armstrong, and found guilty of Manslaughter, and acquitted of the Murder; and immediately after the Verdict the Brother and next Heir of the Deceased, exhibited his Bill of Appeal instanter against the said Lysle, before the Justices of Gaol-delivery there; and he was arraigned upon the Appeal forthwith, and being put to answer he refused to plead; and nothing more was done upon the Verdict of Appeal at that Assise, but Lysle continued in Custody at Carlisle, until Michaelmas-Term, 1696.

And then the Court of B. R. was moved for a Certiorari, and for an Habeas Corpus, the one to remove the Indictment, and the other to remove the Person thither, which was granted, tho' opposed by the Appellant; and about the later End of this Term the Writs were returned; and Lysle was brought to the Bar in Custody; and the Record of the Indictment, Conviction, and also of the Appeal, were likewise brought into Court, and the Returns filed, and Lysle was committed to the Marshal.

Then it was debated concerning the Matter of the Appeal, (viz.) Whether it was necessary that the Appellant should appear at that Time in Court, and pray to have the Prisoner arraigned de novo upon the Appeal; and if so, then whether it was necessary for him to appear in propria persona, or whether he might do it per Attornatum.

Curia.

Et per Curiam, In Cases where an Appeal is commenced below, and afterwards removed, as in this Case, 'tis necessary that the Prisoner should be arraigned de novo, upon the same Bill of Appeal, and not to exhibit a new Bill against him here in custodia Marr. &c.

And that the Appellant was not demandable at this Time, because by the Certiorari he had no Day in Court, and therefore in such Case the only Course is, for the Prisoner to sue out a Writ of Scire facias against the Appellant, reciting the whole Matter, and so to warn him to appear at a Day certain, to prosecute his Appeal in this Court; and then if the Appellant should make De-
fault

fault on that Day, the Court upon Demand might nonsuit him, but not otherwise.

Sed per Curiam, The Appellant may come in gratis, if he will, and prosecute his Appeal without a Sci. fa.

Afterwards Hill. 8 Willi. the Prisoner being brought again to the Bar, it was moved that he might be bailed, because he had laid more than a Year in Custody; and the Appellant refused to come in gratis to prosecute his Appeal.

But this was opposed by the Appellant, and a Warrant of Attorney was produced from him, and it was moved, that it might be filed, and then the Appellant would proceed per Attornatum.

But the Court at that Time would not give Leave to file this Warrant, (for they were not satisfied whether the Appellant could make his Attorney or not before he had once appeared here in propria persona, for afterwards it was clear he might make his Attorney; for the Defendant could not wage Battle in this Appeal, because he was convicted of Homicide, and this depended upon the Construction of the Statute 1 H. 7.

Then it was moved in Behalf of the Appellant, that Lysle, before he was bailed, on the Conviction, might give Bail on the civil Side to answer the Appellant.

Sed per Curiam, He shall be bailed on the Crown-Side to appear de die in diem, and that could be no Inconvenience to the Appellant; for he might proceed against him upon the Appeal at any Time, and he was bailed accordingly.

Afterwards 1 die Febr. Lysle appeared at the Bar again, and then the Solicitor General (by the Procurement of Lysle) moved the Court in Behalf of the King, that Lysle might be demanded what he had to say why Judgment should not be awarded against him upon the Verdict supra, and having procured the Ordinary to attend with his Book to be ready upon his praying the Clergy.

But this was opposed by the Appellant's Counsel, for if Clergy should be allowed him, the Appeal would be at an End; because Autrefois convict of Homicide, and Clergy had, is a good Bar to an Appeal.

And at another Day he was demanded by the Court ut supra, and he prayed the Benefit of Clergy, and had it, & legit ut Clericus & cauterizatur.

Dalbury & Foston Parishioners in Com.
Derby.

3 Mod. 330.
What Notice
is necessary
to be given
of a poor
Man's com-
ing into a
Parish.

TWO Justices made an Order for the settling Robert Blood and his Wife, reciting that he was by Trade a Smith, and that at such a Time he came from Dalbury, the Place of his Birth, into the Parish of Foston, and there rented a Smith's Shop of a small yearly Value, and worked at his Trade for a whole Year, and was employed by most of the Inhabitants there, and particularly by one Everard a Justice of Peace; and therefore they adjudged that this amounted to Notice as required by the Statute 2 Jac. and for this Reason, they by this Order settled him at Foston.

And upon an Appeal to the Sessions from this Order, in which all the Matter supra was specially set forth, it was held, that this did not amount to such Notice as was required by the Statute, therefore they vacated that Order.

And now the Sessions Order being removed into B. R. by Certiorari, it was moved, that it might be quashed, for that this Matter appearing in the Order, did in Law amount to Notice sufficient within the Meaning of that Statute.

Sed per Curiam, All this Matter will not supply the Notice which is now required by the explanatory Statute of W. & M. and they distinguished thus:

1. That when one Act is made Explanatory of another, this Court cannot carry the Explanation farther than is expressed in that Act; but upon an original Statute, the Court will make Construction according to Equity.

Wherefore the Order of Sessions was confirmed.

Chamberlain *versus* Harvey. Intratur Trin.

7 W. 3. adjudged Hillary 8.

3 Mod. S. C.
Trespas will
not lie for
taking away
a Negro.

TRESPAS, &c. for that the Defendant vi & armis unum Ethiopem (Anglice vocat') a Negro ipsius querentis pretii 100 l. apud London', &c. took and carried away, and kept the Plaintiff out of Possession of the said Negro from that Time usque diem exhibitionis Billæ prædictæ per quod he (the Plaintiff) lost the Use of his said Negro.

Upon Not guilty pleaded, the Jury gave a special Verdict, the Substance whereof was as followeth:

It. They find that the Negro had been baptized after the Taking, &c. and the Matter was argued upon that Point, (viz.) Whether the Baptism was a Manumission, and as to that the Court gave no Opinion.

Sed per Curiam, An Action of Trespas will not lie, because a Negro cannot be demanded as a * Chattel, neither can his Price be recovered in Damages in an Action of Trespas, as in Case of a Chattel; for he is no other than a slavish Servant, and the Master can maintain no other Action of Trespas for taking his Servant, but only such which concludes per quod servitium amisit, in which the Master shall recover for the Loss of his Service, and not for the Value, or for any Damages done to the Servant.

Judgment quod querens nil capiat per Billam.

* 2 Lev. 201.
Adjudged on
a Special
Verdict, that
Trotter did
not lie for
a Negro.

Boreham versus Waltham, Parishes in Suffex.

THE Case was, Hester Wood an unmarried Woman being big with Child, was by an Order of two Justices removed from Waltham to Boreham as her last Place of Settlement, from which Order Boreham appealed; but before the next Sessions, she was delivered of this Bastard Child at Boreham; and afterwards the Order of the two Justices was vacated upon the Appeal, and upon that the Woman and her Child were sent back to Waltham.

A Bastard
Child born
pending the
Appeal.

Then two Justices made a new Order, by which the base Child only was sent to Boreham, because it was born there; which Order being removed into B. R. by Certiorari, it was moved to quash it.

Sed per Curiam, The Child ought to follow the Mother in this Case, because Boreham could not remove the Woman (who was sent thither by an Order) till the Appeal was determined; so they had no Remedy to prevent the Birth of the Child in their Parish.

Parker

Parker *versus* Mellor, & al'. Hill. 8 Will. 3.
B. R. Rot. 59.

In Replevin
the Defen-
dant pleaded
Property
in another,
&c.

IN Replevin, &c. for taking two Heifers.
The Defendants plead in Bar, that at the Time of
the Taking, &c. the Property of these Heifers was in
one John Bamford, absque hoc, that the Property of them
was in the Plaintiff, Et hoc parat' est verificare unde
petit judicium si prædict' R. Parker actionem suam præ-
dict' inde versus eos habere seu manutenere debeat & pe-
tunt etiam Return' averiorum sibi adjudicari, &c.

See Antea.
Butcher *ver-*
sus Porter.
The like Opi-
nion.
39 H. 6. 35.
2 Cro. 519.
2 Roll. Rep.
64.

And upon a Demurrer to this Plea, it was adjudged
Pasch. 9 Will. 3. that this was a good Plea in Bar; and
that the Defendant should have a Return of the Cat-
tle awarded, without any special Suggestion for that
Purpose.

The King *versus* Broom.

Ship con-
demned in
the Court of
Admiralty as
Prize.

BROOM being Master of a Ship belonging to the A-
frican Company, he in the Northern Parts of Guinea
(near a Port called Bisaw) took a French Ship on the high
Seas richly laden, the French being then at Enmity
with us.

As soon as this Matter came to the Knowledge of
the Admiralty in England, a Libel was exhibited in the
Court of Admiralty (in common Form) against the Ship
so taken, and her Loading, and against Broom, & contra
omnes, &c.

And after the usual Notice upon the Exchange, this
French Ship and Goods were, by Sentence of the Court
of Admiralty, declared as lawful Prize; and hereupon
Franklin the King's Proctor in that Court exhibited a Li-
bel against Broom to call him to answer the King the Va-
lue of the Prize.

See Postea.
Brown *versus*
Franklin.

In this Libel the Matter of Fact was set out at large,
and that the Taking was upon the high Seas, but that
presently after Broom ordered the said Prize-Ship, and
Part of the Goods, to the Island of Barbadoes, and there
sold them; and that he had sold and converted all the
rest to his own Use, and then the aforesaid Sentence was
set out; and upon the Whole, that Broom might account
and answer for the Value to the King.

To
I

To this Broom pleaded in the Court of Admiralty, and insisted, that he was not the Master of the English Ship which took this Prize, but that one John Brooker was the Master, and he but Lieutenant; nevertheless there was a Sentence against Broom to answer the Value of 3000 l. to the King, from which Sentence he appealed to the Court of Delegates; and after his Appeal, (viz.) Pasch. 9 Will. 3. Broom moved the Court of B. R. for a Prohibition, suggesting, that by the first Sentence of Condemnation as Prize, the Property of the Ship and Goods were vested in the King, so as he might and should have his Action to recover, &c. in the Courts of Common Law, where Property ought to be determined; and thereupon a Rule was made for a Prohibition, nisi, &c.

And in Trin. 9 Will. 3. this Matter was fully debated; and it was insisted by the Counsel for Broom, that this second Libel against him was in Lieu of an Action of Trover, of which the Court of Admiralty cannot hold Plea.

Winch 8. 1 Brownl. 34. 12 Rep. 77. 1 Roll. Abr. 319.

Sed per Curiam, It was answered and resolved, that no Prohibition shall go, because the Court of Admiralty had Jurisdiction of the original Cause, which was the Capture upon which the King's Title immediately accrued, and the Embezzlement was immediately upon the Capture, and so all was but one continued Act; and this second Libel was but a Continuance of the first Suit, and a Charge grounded on the first Sentence by Way of Execution thereof.

Yelv. 134,
135.
Cro. Eliz.
685.
2 Saund. 259.
1 Sid. 320.
See antea Edmondson v. Walker.

1 Roll. Abr.
532.
2 Roll. Rep.
80.
Cro. Car. 69.
Latch 253.
1 Vent. 173.

DE

D E

Term. Paschæ.

Anno 9 Willielmi 3. B. R.

Duke of Norfolk *versus* Alderton.

Visne not
changed in
an Action
for Scandal.

THE Duke brought his Action *qui tam*, &c. upon a Scandalum Magnatum, and laid the Action in Middlesex, and the Defendant moved to change the *Visne* into the County of Sussex, upon the common Affidavit, that the Words (if any such) were spoken there.

* 1 Vent. 363.

And the Lord * Shaftsbury's Case was cited, where in the like Action laid in London, the *Visne* was changed into Middlesex.

Sed *per Curiam*, That was because of the great Influence that Lord had at that Time in London.

So the Motion was denied.

What shall
be an Hiring
and what a
Service.

Chesterfield *versus* Hamlet of Walton.

5 Mod. 328.
2 Salk. 478.

UPON a Motion to quash an Order of Sessions for the County of Derby, by which an Order made by two Justices was confirmed; and by which one Jerrison and his Wife were settled in the Hamlet of * Walton, which lies within the Parish of Chesterfield, which Order of Sessions was special, reciting, that this Jerrison had been a Foot-boy to Sir Paul Jenkinson, who lived in the Hamlet of Walton, so long as to gain a Settlement there, (*viz.*) for three Years, and more.

* Note, Walton maintains its own Poor distinct from the Parish of Chesterfield.

Then Sir Paul put him out to one Thorpe, a Barber, (who lived in Chesterfield, but out of the Hamlet of Walton) for one Year, to learn to Shave, and the Barber was to have the Benefit of the Boy's Work, and that Sir Paul gave the Master some Money to teach the Boy to Shave, who lived with the Barber accordingly in the said Parish for one Year; but no Notice of his coming was given by him to the Parish, nor any Warning from them to him.

The Question was, If this made a Settlement of the Boy in the Parish of Chesterfield, as an hired Servant, within the Intent of the * explanatory Statute, concerning the Settlement of poor People. * 3 & 4 Will. 8c Mar.

Et per Curiam, This is not such an Hiring of such a Service as is within the Intent of the Statute, because here was no reciprocal Contract between the Boy and the Barber, for the Boy was not obliged to stay in the Service of the Barber, and he had no Remedy to compel him to serve; and every Hiring within that Statute must be reciprocal; but here the Boy was in Nature of a Scholar, and not of a Servant, so the Order of Sessions was affirmed.

Puleston versus Warburton.

IN Ejectment tried at Bar, in which the Plaintiff had a Verdict in Michaelmas-Term, Anno 8. Will. 3. 1696. and now it was moved to amend the Declaration, it being delivered as of Trinity-Term before; and the Demise upon which the Plaintiff declared, was said to be made 10 April, Anno 1697, instead of 1696. Habendum from the 25th of March then last past, so that the Trial appeared to be had half a Year before the Demise, upon which the Plaintiff declared; and now it was moved to strike out the Word Septimo and put in Sexto; and a Rule of Court was produced between Parr and Cawley, where, after Error brought upon a Judgment by Confession in Ejectione firmæ, such Amendment was made in the Declaration; but that being a Judgment by Consent of Parties, was held to be no Authority in this Case. 5 Mod. 332.
1 Salk. 48.
Where it was denied to amend a Declaration in Ejectment.

* 1 Mod. 250, 252.

Sed per Curiam, This shall not be amended, and therefore a new Trial was had at Bar between the same Parties in Michaelmas-Term, 9 Will. 3. &c.

Nota, The Declaration in Ejectment between Thompson and Leech, amongst other Things, was of so many Acres Ligni instead of Bosci; and before that Cause was tried at Bar, it was moved to amend it, but it was denied, and therefore the Jury were informed to find separate Damages as to that particular.

And in the Case of Hutchins and Bassett, the Court denied to enlarge the Term in Ejectment, which after a special Verdict was expired, without the Consent of Sir William Bassett; but in the Case of * Dighton and Greenville the Term was enlarged, tho' the Defendant refused to consent.

* See antea.

Chumley *versus* Broom.

5 Mod. 335.
Plea to the
Jurisdiction
of the Court
is never
sworn, but a
foreign Plea
is.
Style 225.
Litt. Rep.
236.
1 Sid. 330.
1 Saund. 97.
1 Mod. 81.

AN Action of Debt was brought in B. R. and the Plaintiff laid the Visne in such a Place within the County Palatine of Chester, which County was also in the Margin of the Declaration.

The Defendant did not imparl, but pleaded by Attorney, that he is, and at the Time of the Action brought, was resident at the said Place within the said County Palatine of Chester, and so prayed Judgment, if the Court of B. R. ought to hold Plea of this Matter.

But the Plaintiff rejected this Plea, because it was not sworn by the Defendant (taking it to be a Foreign Plea) and therefore he signed Judgment for Want of a Plea.

Sed per Holt Ch. Justice, A Foreign Plea is where the Action is carried out of the County where 'tis laid, which in this Case was not done, so that this is only a Plea to the Jurisdiction of the Court, which is never sworn; so the Judgment was set aside.

Fisher versus Pomfrett.

THE Case was, *ff.* a Bill of Exchange payable to T. S. who endorsed it in this Manner.

ff. Pay the Contents of this Bill unto the Order of Mr. Fisher, who brought his Action as Endorsee, averring he had made no Order to any Body to receive the Money.

Bill of Exchange indorsed, and made payable to the Order of the Plaintiff.

The Defendant demurred to the Declaration, supposing that Fisher could not maintain the Action, because the Indorsement was not to him, but to his Order.

Sed per Curiam, The Action is well brought against the Indorser, for amongst Tradesmen this Form of Indorsement is commonly used, altho' 'tis intended to be made payable to the Person whose Order is mentioned.

The Plaintiff had Judgment.

Whaley versus Reynolds, & al'. Intratur Pasch.
9 Will. 3. B. R. Rot. 113.

SCI. fa. reciting that Whaley alias scil't Termino Sancti Hillari anno 7 Willi. implacitasset per Billam sine Brevi Johannem Lawrence, &c. pro eo videl't quod cum, reciting the whole Declaration in an Action on several Promises, and concluded in the present Tense, unde dicit quod deteriorat' est & damnum habet, &c. Cumque pendente Billa predicta scil't Termino Paschæ extunc prox' sequen' Johannes Reynolds & Thomas Lindsey became Bail (as in common Form) Cumque etiam postea in eadem Curia, &c. taliter superinde processum fuit, that Whaley recovered against Lawrence 17l. 14s. 6d. &c. and so concluded in common Form, &c.

Whether the Bail shall be permitted to aver against the Record.

The Defendants appeared and pleaded in Bar, quod tempore Exhibitionis Billæ predictæ by Whaley against Lawrence, seu ad aliquod tempus infra prædict' Terminum Sancti Hillari anno 7 supradicto, the said John Lawrence non fuit prisonarius in Custodia Marr' hujus Curia & hoc, &c.

And upon a Demurrer to this Plea, the Question in Law was, Whether the Bail shall be permitted to aver against the Record in the original Action where the Declaration was against Lawrence in Custodia Marr' in Hillary-

Term ann. 7 Willi. now if he was not in Custody in that Term, as the Defendants in their Plea have averred, then this Bail cannot be taken to be in the same Action.

And the Court inclined against the Plea, but afterwards this Sci. fa. was quashed, because the Declaration was all set out by way of Recital; but was concluded in the present Tense ut supra, so the Matter in Law was not determined.

D E

Term. Sanct. Trin.

Anno 9 Willielmi 3. in B. R.

Penoyer versus Brace.

5 Mod. 338.
1 Salk. 319.
Judgment against several Defendants, who all join in a Writ of Error, and before the Return one died; the Writ is abated.

IN Assault and Battery against several Defendants, and Judgment against all of them; they all join in a Writ of Error, and then one of them died before the Return of that Writ, which the Plaintiff in the original Action perceiving, he forthwith took out Execution upon the Judgment against the Survivors, without suing out a Sci. fa. against them, and took the Goods in Execution.

And now it was moved to have Restitution, for that in this Case there ought to have been a Sci. fa. against the surviving Defendants before any Execution should go against them; but it should be otherwise, yet the Plaintiff in the Action could not in this Case take out Execution without Leave of the Court, because a Writ of Error was sued forth and allowed, and thereby all Execution superseded.

Sed

Sed per Curiam, After several Debates it was resolved, that Execution might be taken out against the surviving Defendants without a Sci. fa. against them, for 'tis not necessary.

Isham's Case.
Moor 367.
2 Inst. 471.
21 H. 7. 16. b.
Dyer 175.
Noy 150.
Carter Rep.
112, 193.

But here being a Writ of Error brought and allowed, and the Execution once superseded, the Plaintiff in the Ass. on cannot sue out Execution until the Court is informed of the Abatement of the Writ of Error, by the Death of one of the Plaintiff's in Error, before the Return of the Writ; for in Strictness, that Matter ought to be suggested on Record, and the Court ought to adjudge the Writ abated, &c.

Restitution was awarded.

The King *versus* Paine.

THE Defendant being a Clergyman in Bristol was indicted there, for composing, making, writing, and publishing a scandalous Libel upon the King and late Queen, and their Government; which Indictment being removed into B. R. and carried down to be tried at the Nisi prius, it was tried accordingly, and the Jury acquitted the Defendant as to the Publishing the Libel, and as to the rest they found a special Verdict to this Effect:

5 Mod. 163.
1 Salk. 281.
Whether
Writing a
Libel shall
be the Ma-
king it.

That the Defendant did write this Libel dictated to him by a Person unknown to him, and to the Jury; and that the said Stranger dictated all the subject Matter according as he (the Defendant) wrote it.

The Question was, Whether this doth amount in Law to a Composing and making a Libel.

And it was argued against the Defendant, that the Writing the Matter is the Making the Libel, for tho' 'tis never so bad, 'tis no Libel till written; for 'tis Writing which is the essential Part of a Libel, and the Case de * Libellis * 5 Rep. famosis was relied on.

On the other Side it was said, that the Writing is Evidence proper to be given to a Jury to induce them to believe, that the Writer did make and compose the Libel; but here the Jury have distinguished the Composing from the Writing, for they expressly find that the Words were dictated to the Defendant by another Person; and if another did compose the Words, then the Defendant did not, and * Lamb's Case was cited where there is a full Description

Econtra for
the Defen-
dant.

* 9 Rep. 59.

tion

tion and Definition of a Libel and a Libeller, but it doth not extend to the principal Case. Moor 813.

And as to the Transcribing a Libel, the Cases in the Margin were cited.

*Hob 62.215.
Poph. 139.
12 Rep. 35.
Cro Car. 125.
3 Inst. 174.
1 Vent. 31.

Then it was objected as to the Verdict, (viz.) That the Jury have left a Matter of Fact undetermined; for 'tis laid in the Indictment, that the Defendant did make, compose, write and publish this Libel seditiously, and with an Intent to subvert the Government; and they have found nothing as to the Intent, like an Indictment for Perjury, if the Jury find only the false Swearing, and say nothing as to the Corruption and Malice, the Verdict is imperfect and void, and so here.

Curia: This Case differs from transcribing a Libel, for here it appears, that this was the first Time the Matter was reduced into Writing, for it was written from the Mouth of the Author, so that the Writing seems to be the very making this Libel.

He who dictated cannot be indicted for making this Libel, because he did not write it; then if the Defendant cannot be punished, this Crime is unpunishable.

The King *versus* Peckham.

Where Time
in a Statute
is expressed
by the Year,
it shall be
computed by
Solary
Months; but
where
Months are
mentioned,
it shall be
Lunary
Months.

MOVED to quash a Conviction for Deer-Stealing, made by a Justice of Peace upon the Statute 3 & 4 Willi. the Exceptions were;

1. That by the Words of the Statute, the Prosecution ought to be within twelve Months after the Fact; but by this Conviction it appears that twelve Lunary Months were expired after the Fact, and before any Prosecution commenced.

(2.) That Aylesworth, which was the Place where the Fact was laid to be done, is not expressed in the Conviction to be a Parish, which ought to appear to be a Parish, because one Part of the Penalty is given to the Poor of the Parish where the Fact was committed.

And now the Record of the Conviction being produced, it appeared that the Prosecution was commenced before the End of 12 Kalendar Months, but after the End of 12 Lunary Months; and thereupon a Question did arise in what manner the Months mentioned in this Statute should be computed, either by the Sun or the Moon.

And

And this Difference was taken, to which the Court agreed, (viz.) Where Time mentioned in any Statute is expressed by the Year, half Year, or Quarter of a Year, 'tis always computed in Law by Solar Months, (viz.) twelve Calendar Months for a Year; but where Months are mentioned in a Statute, and not Years, those are always computed by the Moon, (viz.) Four Weeks to the Month; therefore this Statute appointing the Prosecution to be within twelve Months after the Fact; and twelve Lunary Months being expired before any Prosecution, for that Reason the Conviction was quashed.

Hob. 179.
2 Inst. 320.
2 Roll. Abr.
522.
2 Cro. 167.
1 Sid. 186.

No Notice was taken of the second Exception.

The King *versus* Bear.

THE Defendant was indicted at the Summer Assizes in Excester, Anno 8 Will. 3. for libelling the King and Government; and the Indictment was in this Form following:

*Indictment
for a Libel
containing
Words juxta
tenorem & ad
effectum,
good.*

¶ After the Introduction and Words of Aggravation, with Respect to the King, as usual in such Cases, it was laid.

That he (the Defendant) 19 Octob. 7 Will. 3. at Buckland all Saints in the County of Devon, subdole falso & malitiose composuit scripta & fecit & componi scribi & fieri causavit ac sibi procuravit & industrie collegit separal. scandalosos falsos & seditiosos libellos continen. in se de dicto Domino Rege nunc & ejus aequa justa & clementissima gubernatione quamplurima falsa malitiosa & seditiosa verba & sententias materias diction. & expression. (viz.) in uno libello eorum intitulat. The Belgick Boar, to the Tune of Chivy-Chase, continetur inter alia juxta Tenorem & ad effectum sequen. (videlicet) reciting the Words in English, and after that seven other libellous Ballads were set out in the Indictment in the same Manner as the First, with juxta Tenorem & ad effectum sequen', and then the Indictment was thus concluded, (viz.) Quos quidem falsos & scandalosos Libellos (quorum diversi fuerant impressi) ipse predict. Johannes Bear adtunc & ibidem scilicet eodem 19 die Octob. Anno 7. supradicto apud Buckland tota Sanctis predicti. & diu postea in manibus & custodia suis & penes se scienter & advisate clandestine & scintiose habuit & custodivit in promptu & parat. ad eisdem inter subditos dicti Domini

Domini Regis & factiosas seditiosas & malitiosas personas dispergend. divulgand. & publicand.

This Indiamment being removed into B. R. it was sent down to be tried by Nisi prius, and the Jury found the Verdict following:

ff. Quoad scriptionem & collectionem libellorum in indictamento mentionat. tantum quod defendens est culpabilis & quoad totum residuum in eodem indictamento content. quod defendens non est inde culpabilis.

And now it was moved in Arrest of Judgment, and two Objections were made for that Purpose.

(1.) First as to the Form of the Indiamment, for that the Charge which was laid to the Defendant was not so certain and particular as it ought to be, for the Libels are not set forth in hæc verba, as they ought, neither is the Defendant charged directly with the Writing or Making the very Words and Sentences expressed in the Indiamment, but only, that he made and wrote Libels, in which inter alia continetur juxta Tenorem & ad effectum sequen.

So that it appears the Words set forth in the Indiamment are not the very Words which the Defendant did write, but other Words secundum effectum & tenorem of the Defendant's Words; now no Person hath Power to judge criminally of the Effect of a Man's Words, for that must be left to the Law; and how is it possible that the Law should make any Judgment of the Effect of Words, unless the very Words themselves spoken or written are set down in the Record; and it would be of very dangerous Consequence in a Course of Justice, if it should be in any Man's Power to make a Construction of another Man's Words and Expressions, so as the Law should judge upon such Construction; for if that should be admitted, then every Man would be at the Mercy of his Enemy; for they would not be judged upon their own Words and Meaning, but upon a wrested Exposition of their Adversaries.

Therefore to prevent this Mischiefe, the Law hath always been very strict in Indiamments, and in Actions on the Case for Words or Libels, requiring the very Words and Expressions in the Record to be punctually proved, otherwise the Defendants have always been acquitted.

It is true, a Libel in English Words, may in the Indiamment or Action be translated into Latin, but then it must be directly and positively alledged, that the Defendant fecit or scripsit, or dixit, &c. but not juxta tenorem & effectum; for

that is no Allegation of Matter of Fact directly, but only by Way of Construction and Exposition of the Sense and Meaning, &c. Wherefore it was insisted, that this Indictment ought to be quashed for this Reason.

(2.) Obj. was to the Verdict, (viz.) That no Judgment ought to be given against the Defendant upon this Verdict, because the Jury had acquitted him of all that Part of the Indictment which was criminal, and found him guilty only of writing and collecting Libels, which is rather a Folly than a Crime.

And here the Writing cannot be taken to be Making or Composing the Libel, as it was insisted on in Paine's Case, for the Jury have expressly found, that he did not make or compose the Libels, nor intend to publish them; so that all which is found, is no more than that the Defendant did copy, transcribe and collect those Libels which were made and composed by Another, which the Defendant never did, or intended to publish; and in Lamb's Case, 'tis expressly resolved, that the Defendant must be found to be either the Contriver or Procurer, or Publisher of a Libel, otherwise he cannot be convicted for a Libeller; and the Defendant in this Case is not found guilty of any of these Things, and therefore not a Libeller in Construction of Law.

Sed per Curiam, It was agreed, that if the Indictment had been for a Libel, containing inter alia ad effectum sequen. it would have been naught, but that juxta tenorem sequen. would have been good, because Tenor is the same as hæc verba; and 'tis good notwithstanding the Clause inter alia, because the Words laid in the Indictment are not capable of any Qualification by other Words, so as to excuse the Crime.

Curia.
1 Sid. Thinn's
Case.
Reg. 169.

That upon Indictments thus laid by Way of Juxta tenorem & ad effectum sequen. the very Words laid in the Indictment, and not the Substance and Effect of them, must be proved as strictly as if laid to be in hæc verba.

That the Transcribing and Collecting this libellous Matter was highly criminal, without publishing it, and that it was of dangerous Consequence to the Government; for tho' the Writer or Collector never published these Libels, yet his having them in Readiness for that Purpose, if any Occasion should happen, is highly criminal; and tho' he might design to keep them private, yet after his Death they might fall into such Hands as might be injurious to

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the Government, therefore Men ought not to be allowed to have such evil Instruments in their Keeping, &c.

Jones *versus* Morley. Intratur 4 Jac. B. R. Rot. 146 or 176, and argued Trin. 9 Will. 3.

4 Mod. 261.

2 Salk. 677.

Fine and
Deed be-
tween Hus-
band and
Wife.

THIS Case in Effect was as followeth:

¶ Husband and Wife were seised in Fee of Lands in Right of the Wife; and by Indenture made between them and others, bearing Date 29 January, it was recited, that a Fine was intended to be levied by the Husband and Wife of these Lands, by which Indenture they covenanted to levy the said Fine, as of the next Hillary-Term, and then the Uses were declared to which the said Fine should enure after it was so levied.

¶ To the Husband and Wife, and the Heirs of the Husband.

About two Days afterwards, (viz.) 31 January, there was another Indenture executed, to which Indenture the Husband and Wife only were Parties, by which it was agreed and covenanted between them, to the Effect following:

¶ That all former Contracts, Covenants and Agreements made between them should be suspended, and take no Effect until the Husband should settle such a Manor upon his Wife for Life, as an Addition to her Jointure.

Afterwards the Fine was levied accordingly in the very same Hillary-Term, in which both the Indentures did bear Date.

The Husband did not convey his Manor according to the last Indenture, but died without Issue; and now the Question was (after the Death of the Wife) who should have her Lands, (viz.) Whether the Heir of the Husband, or the Heir of the Wife, who was Lessor of the Plaintiff.

The Objections against the Heir of the Wife were these:

(1.) That the second Indenture could not control the first, because it was not made between all the same Parties, which were to the first.

(2. Obj.) That the second Indenture is void, because it is made only between Husband and Wife, who are but one Person

Person in Law; and therefore they cannot covenant with one another, for if they do, those Covenants are of no Effect.

(3. Obj.) For that the Wife hath by the first Indenture given her Consent, and agreed with her Husband, that the Uses of the Fine should be as therein is declared; and therefore she cannot afterwards recede, but is bound by the Limitations to which she had consented.

But it was agreed by those who argued for the Defendant, that a second Agreement by Deed made between the same Parties, if made before the Fine levied, would control the former.

Econtra for the Heir of the Wife.

It was argued, that the Husband and Wife are not so united, but that he may obliquely, though not directly make a Conveyance to the Use and Benefit of the Wife, (viz.) by way of Giftment to a Stranger to her Use.

Now the Point of this Case is not with Respect to any substantive Deed which requires an exact Form and Parts, because these Indentures do not convey any Thing but are only Matter of Evidence, declaring the Intent of the Parties concerning the Operation of the Fine.

And as for that Purpose, there can be no Reason why a subsequent intervenient Agreement in Writing without a Seal should not control a precedent Writing with a Seal; for that with a Seal doth not operate properly as a Deed to pass or convey any Thing, but consists wholly in Covenant, and 'tis at most but a declaratory Deed; and in this Case the first Indenture is in Strictness no more the Deed of the Wife, than the second, because a * Feme-Cover cannot make a Deed.

* Dyer 307.
2 Roll. Abr.
798.
Brigdm. 111.

And here the first Indenture was not utterly defeated by the second, but explained only and suspended quousque the Husband had performed his Part in conveying his Manor, &c. in Jointure to the Wife.

Lastly it was objected, That here was a Variance between the first Indenture and the Fine, for by that Indenture the Fine was to be levied the next Hillary-Term, the Indenture bearing Date 29 January, which is in Hillary-Term, so that the next Hill. Term must be a Year after; but this Fine was levied in the same Term with the Date of the Deed; and therefore an intervenient Parol Agreement may be averred.

Gouldf. 137.
2 Cro. 646.
2 Roll. Abr.
799.

Curia.

Et per Holt Chief Justice, Where a Deed is made between several Parties to lead the Uses of a Fine to be levied between such Persons, and afterwards a Fine is levied of the same Lands, but is different from the Deed in the Circumstances of Quantity of Acres, Time of levying it, or Parties to the Fine; yet it shall operate to the Uses of that Deed, unless a contrary Intent or Agreement is proved; and in such Case a Proof of a Parol Agreement intercurrent between the Deed and the Fine, that the Uses should be otherwise than in the Deed, shall be admitted, because of the Variance.

But if the Fine is pursuant to the Deed which leads the Uses thereof, and they agree in Circumstances, in such Case no Parol Agreement of any other intercurrent Agreement (without Deed) can be admitted against such Deed; but a second Deed of Uses intercurrent and agreeing also in all Circumstances with the Fine, shall control the first.

But the first Deed cannot be controlled by any other Deed made after the Fine is levied, much less shall any subsequent Agreement by Parol control any precedent Deed, and in the principal Case if this second Writing is not properly a Deed, because made only between Husband and Wife; then the Question will be, if it amounts to any more than an Agreement put into Writing; and if so, then it is any other than a Parol Agreement which cannot be admitted against the first Deed.

The Plaintiff had Judgment, and upon a Writ of Error brought in the House of Lords, that Judgment was affirmed.

Bacon versus Dubarry.

1 Salk. 70.
2 Salk. 787.
Award ex
parte void.

DEBT upon a Bond of Submission to an Award, and upon Oyer of the Condition, it appeared to be to this Effect:

It recited that there was a Difference between the Plaintiff Bacon, and one James de Rutter, who lived at Hamburgh, and that the Defendant Du Barry, as Attorney for the said James De Rutter, and the Plaintiff Bacon, had submitted all Matters, &c. between the Plaintiff and De Rutter unto the Arbitrators, &c. therefore if the Defendant did perform the Award then, &c.

The Arbitrators awarded, that the Defendant Du Barry on the Behalf of De Rutter should pay to the Plaintiff Bacon 300 l. and that he (the Plaintiff) should execute a general

Release unto the Defendant Du Barry, and this Award being set forth in the Declaration, the Defendant demurred.

And it was argued that this was an Award only ex parte, and therefore void, for that there was nothing awarded on the Part of De Rutter who was the principal Person concerned, for the Differences were between him and the Plaintiff, and not between him and the Defendant; and therefore the Awarding the Plaintiff to Release the Defendant signified nothing, because De Rutter can take no Benefit by such Release, for he will still remain liable to, and charged with the Demands of the Plaintiff Bacon, for the Award hath not determined the Differences to which the Parties submitted, for those were between the Plaintiff and De Rutter, and not between the Plaintiff and the Defendant.

And after many Debates upon this Cause, it was adjudged, that this Award was void, for the Reasons supra, (viz.) it being an Award ex parte.

Sed per Curiam, The Submission by the Defendant as Attorney for De Rutter is good, and would have obliged him to pay the Money awarded, if the Award had been reciprocal with respect to De Rutter also.

Submission by one as Attorney for another is good.

Giles versus Hart. Argued Trin. 9. and adjudged in Michaelmas-Term 9. following.

THIS was an Indebitatus assumpsit for Goods sold, and the Plaintiff had laid in his Declaration a special Request at a Day certain, which was subsequent to the Day in which the Promise was laid to be made in the Declaration.

The Defendant imparled specially with a Salvis tibi, &c. in common form, and afterwards he pleaded in Bar to the Action, that he tendered the Money demanded to the Plaintiff on that very Day in which he had laid the special Request supra, and from that Day forward semper paratus fuit to pay it, & profert hic in Curia, &c.

And upon a Demurrer to this Plea, after several Debates, it was adjudged ill.

First, Because it was pleaded after an Impar lance, which is contradictory to that Part of his Plea, (viz.) semper paratus, and the special Impar lance makes no Difference,

2 Salk. 622.
'Tis a good Plea to say semper paratus & profert hic in Curia, without a Tender.

ference, for it appears thereby, that he was not *semper paratus*.

Surplusage.

The Plea is likewise ill, because the Defendant hath not said any Thing as to the Time between the Promise and the Request, and the Money was due on the Day of the Promise; and therefore the Defendant ought to have pleaded the Tender on that Day, and that he from that Day was always ready; for the Special Request laid in the Declaration is only Surplusage; therefore the Day on which the Request was made is immaterial; and when once the Cause of Action accrued, a subsequent Tender could not take it away.

Sed per Holt Chief Justice, In these Cases the best way of Pleading is to plead generally *semper paratus*, &c. & proferat hic in Curia, without Pleading any Tender.

Holland *versus* Hatton.

Where a Mortgage was made, and afterwards a second Mortgage of the same Lands by Deed and Fine to another, and 6 Years past, the Mortgagee being all that Time in Possession, and paying the Interest.

THE Case was thus, (viz.) Edward Lord Griffin being seized in Fee of the Lands in Question, made a Mortgage thereof to Samuel Mountford for five hundred Pears, and continued still in Possession, and paid the Interest of the principal Sum secured by this Mortgage for one Year, and then he made a subsequent Mortgage in Fee by way of Lease and Release of the same Lands to the Defendant Hatton, and levied a Fine with Proclamations to Hatton, &c.

The Lord Griffin still continued in Possession, and paid Interest to Mountford for eight Years together, and afterwards Hatton entered on the Lord Griffin, and took Possession by Virtue of this subsequent Mortgage and Fine.

Thereupon Mountford the first Mortgagee and Lessor of the Plaintiff, brought his Ejectment, and the Cause was tried at Northampton Assises, ann. 9 Will. and a Case was made of it, &c.

The Question was, Whether this Fine and five Years Nonclaim, was a Bar to Mountford the first Mortgagee; and it was the Opinion of the Judge, before whom the Cause was tried, and to whom the Case was referred, that it was no Bar, because the Lord Griffin continued still in Possession, and paid the Interest, and so was Tenant at Will to the first Mortgagee; and admitting that the

the Fine did work any Disseisin, yet the Entry of the Lord Griffin immediately upon such Disseisin, did purge it, and he became again Tenant at Will, as before; the * Cases cited were.

* 2 Cro. 685.
3 Rep. 77,
79.
9 Rep. 105.

Sid. 337, 460. Hardres 400, 401. Carter 37, 82, 208. Raym. 148. 1 Vent. 241, 242.
2 Vent. 329.

If the Law should be otherwise, the Inconveniencies with Respect to Mortgages would be intolerable, therefore the Plaintiff had the Postea delivered out to him, and so had Judgment upon his Verdict.

Woodyer *versus* Gresham.

A Feme Sole obtained a Judgment in Debt for 200 l. and then she married, and afterwards the Husband and Wife brought a Sci. fa. upon this Judgment, to have Execution thereof against the Defendant in the original Action; and they had likewise Judgment on the Sci. fa. (viz.) That the Husband and Wife Habeant Executionem against the Defendant; then the Wife died, and after her Death the Husband in his own Right brought another Sci. fa. against the Defendant, reciting the Judgment in the original Action, and the Award of Execution upon the first Sci. fa. (viz.) To have Execution of the Judgment, &c.

1 Salk. 118.
Husband and
Wife brought
a Sci. fa. up-
on a Judg-
ment had by
the Wife *dum
sola*, and they
got Judg-
ment on the
Sci. fa. then
the Wife
died, the
Debt shall
survive to
him.
See O'Brien
versus Rains.

To this the Defendant demurred, and Judgment was given in the Court of Common Pleas for the Husband, the Plaintiff, upon which the Defendant in the original Action brought a Writ of Error in B. R.

And the Question was, Whether the Award of Execution on the first Sci. fa. to Husband and Wife, had vested such an Interest in the Husband to this Debt, as to entitle him to it by Right of Survivorship after the Death of his Wife, as it doth where the Husband and Wife bring an Action and obtain Judgment against the Debtor of the Wife whilst sole.

And adjudged, that the Award of Execution is attached in the Husband by the Judgment in the first Sci. fa. and shall survive to him.

Savill

Savill *versus* Roberts. Trin. 9 Will. 3. B. R.
Rot. 724. *but adjudged* Mich. 10 Will. 3.

5 Mod. 394.
1 Salk. 13.
Several Sorts
of Damages
which are a
Foundation
for an Action.

ERROR of a Judgment in C. B. in an Action on the Case in Nature of a Conspiracy brought by Roberts against Savill and others, for maliciously causing him (Roberts) to be indicted, with others, for a Riot, about stopping up a Way, of which he had been duly acquitted.

Upon Not guilty pleaded the Plaintiff had a Verdict; and upon a Motion in the Court of Common Pleas in Arrest of Judgment, Whether this Action would lie, or not; it was held by three Judges that it would, but Treby Ch. Justice was of another Opinion.

And now after several Debates in B. R. the Judgment was affirmed by three Judges, the other, (viz.) Justice Sam. Eyre being dead.

Et per Holt Ch. Justice, who laid it down for a Rule, that there were three Sorts of Damages, either of which was a sufficient Foundation for an Action.

(1.) Where a Man suffers Damage in his Fame and Credit.

(2.) Where any Damage is done to his Person, as by Imprisonment, Battery, &c. for that Respects his Liberty.

(3.) Where a Man suffers any Damage in his Property.

* 8 Ed. 3. 19.
3 Ass. pl. 13.
7 H. 4. 31.
Yelv. 46.
2 Cro. 42.
1 Saund. 128.
Raym. — in
the Case of Sir
Andrew Hen-
ley v. Bur-
rill.

Wherefore, in this Case, tho' the Plaintiff had not suffered any Damage in his Fame, or in his Person, yet because he had suffered Damage in his * Property by the Expences laid out in his Acquittal, this Action will lie; for no Man who is indicted can be discharged or acquitted, without considerable Expences and Fees laid out to defend himself against the Charge in the Indictment, therefore this Action is maintainable for the Reparation of this Loss in his Property.

And be distinguished between this Action on the Case, which was in Nature of a Conspiracy, and a Writ of Conspiracy at Common Law; for in this Case the Damage sustained is the Ground of the Action, and not the Conspiracy.

But in the other Case the Action is founded merely on the Conspiracy; and if the Defendants are convicted thereon, a † villanous Judgment is given against them; and

† That they shall not be

of any Credit afterwards, nor lawful for them, in Person, to approach the King's Court; that their Lands and Goods shall be seized into the King's Hands, their Trees rooted up, and their Bodies imprisoned

therefore a Writ of Conspiracy doth not properly lie in any Case but where the Conspiracy was to indict the Party either of Treason or Felony at least, by which his Life was put in Danger, and that was the Reason of the villainous Judgment; but all other Cases of Conspiracy mentioned in the old Books, were but Actions on the Case, and not properly Writs of Conspiracy.

And if the Defendants are all found guilty in an Action on the Case in Nature of a Conspiracy, yet no villainous Judgment is to be given against them, but Judgment only for the Damages sustained by the Plaintiff, that being the End of this Action.

Now in the principal Case, the Jury having found, that Roberts was indicted maliciously, and without Cause, tho' the Indictment was but for a Trespass, yet 'tis reasonable the Plaintiff should have Judgment for the Loss which the Jurors find he hath sustained by the malicious Prosecution made by the Defendant; but withal the Chief Justice expressly declared, that these Kind of Actions are not to be encouraged, but that the Judge before whom any of them are tried ought to hold the Plaintiff to a Proof of express Malice in the Defendant in his Prosecution by Way of Indictment, for if it doth not appear that the Prosecution was grounded on Malice, the Action is not maintainable, but the Plaintiff must be nonsuit.

And a * Case was cited, which was thus: A. was indebted to B. and C. and B. without the Knowledge of C. takes out Process in both their Names against A. who afterwards prosecuted B. upon the † Statute for so doing, but B. was acquitted, and then he brought an Action on the Case against A. for this malicious Prosecution; but adjudged that would not lie, because B. might have demurred to the Action on the Statute, for the Case was not within the Statute, and so it was his own Fault, that he was put to Charges by the Trial.

* Prescott v. Chamberlaine. Sid.

† 8 Eliz. c. 11. For procuring one to be arrested in another Man's Name.

See Cro. Eliz. 236.

Parkhurst *versus* Foster. Intratur Trin. 9 Will. 3.
B. R. Rot. 363.

Trespass for entering the Plaintiff's House and billeting a Dragoon upon him (the Plaintiff) against his Will.

5 Mod. 427.
1 Salk. 389.

H h h

Upon

A Soldier
cannot be
quartered on
those who
live at Ep-
som, and sell
Beer to their
Lodgers
without a
Licence.

Upon Not guilty pleaded, a special Verdict was found, by which it appeared, that the Plaintiff lived at Epsom, and lodged Strangers in the Season for Drinking the Waters, and dressed Victuals for them, and sold Beer to his Lodgers, and to none else, and found Hay for their Horses.

That he did not keep a Publick House, and that he had not a Licence for selling Drink from any Justice of Peace.

That the Defendant was Constable, and upon the Coming of a Party of Dragoons there, he quartered one of them upon the Plaintiff against his Will.

* 4 or 5 Will.
3. cap. 13.

The Question was, Whether this was a Victualling-house or Ale-house within the * Statute, so as the Defendant might justify the Quartering a Soldier upon the Plaintiff by Virtue of that Statute.

† 8 Rep.
1 Roll. Abr.
80.

And it was argued for the Plaintiff, that his House was no Inn, and that the Plaintiff was not an Hospitator, such as is described in † Calye's Case, and that an Action will not lie against him, as it doth against an Inn-keeper, if he refuse to entertain a Guest.

That the Lodgers in the Plaintiff's House had such an Interest in their Rooms, that they might maintain an Action of Trespas against any one who should enter there against their Will.

That the Selling Victuals and Beer is merely occasional at the Season of the Year, and 'tis at the Will and Pleasure of the House-keeper; and as for the Plaintiff's Keeping Horses, 'tis expressly found, that he kept none but only for his Lodgers.

In the Case between the King and Marriott, it was adjudged, that a Victualler might sell Beer to those who eat at his House, without any Licence, but to no Body else.

Econtra. It was agreed, that this House was neither an Inn or an Ale-house, or a Victualling-house, or a Livery-stable abstractedly, but that it was complicated, that it was all four of them; and that the Plaintiff was expressly within the Act, because he sold Beer within his House; but if the Selling had been without Doors it might have been otherwise.

Sed per Curiam, Judgment was given for the Plaintiff.

D E

Term. Sanct. Mich.

Anno 9 Willielmi 3. B. R.

Smalcomb *versus* Buckingham, & al'. Vicecom'
London.

THERE being several Judgments obtained against T. S. there were two distinct Writs of Fi. fa. brought to the Sheriff on the same Day, one whereof was at the Suit of Smalcomb, which Writ was delivered to the Sheriffs an hour after the other Writ of Fi. fa. but did bear Teste before it; the other Writ being Teste after Smalcomb's Fi. fa.

Hereupon the Sheriffs made a Bill of Sale to Smalcomb of the Goods of the Debtor, tho' his Writ was delivered to the Sheriffs an hour after the other Writ.

But afterwards and before the Return of these Writs, the Sheriffs (apprehending they were in the Wrong) they made a new Bill of Sale of the same Goods to the other Creditor, whose Fi. fa. first came to their hands, tho' it was Teste after the other, and then they return Nulla Bona upon Smalcomb's Fi. fa.

Whereupon he brought Trover against the Sheriffs, for the Goods sold to him by the first Bill of Sale, by which he supposed that the Property was altered and vested in him.

The Cause was tried before Holt Chief Justice, who made a Case of it, which was argued several Times in B. R. and the Point was upon the Construction of the

* Statute of Frauds, &c. by which 'tis enacted, That the

H h h 2

Goods cap. 3.

3 Mod. 378.
1 Salk. 330.
Where two
Writs of
Execution
are deliver-
ed to the
Sheriff in
the same
Day, he
must ex-
ecute that
which was
first deliver-
ed.

* 29 Car. 2.

Goods shall be bound from the Delivery of the Writ to the Sheriff, and not from the Teste, &c. *

* The Sheriff.

And it was insisted on for the * Defendants, that the Statute doth not make any Fraction of Days, and that this is Casus omissus, for when several Executions are delivered to the Sheriff in one Day, he hath Election which to execute first; and the Priority of the Delivery can be tried only by the Endorsement of the Writ, and that shall be conclusive Evidence against the Sheriff.

3 Cro. 174.
1 Sid. 271.

Exontra for
the Plaintiff.

Esopie.

On the other Side it was insisted on for the Plaintiff, that in this Case the Sheriff's Bill of Sale which was first made to the Plaintiff, shall work as an Esopie in Evidence against him.

But after several Debates, the Judges were of Opinion for the Plaintiff, to which they rather inclined, for that it appeared, that the other Creditor did not demand an Execution of his Writ.

Et per Holt Chief Justice, Where a Writ of Fi. fa. is delivered to the Sheriff to Day, and another to Morrow; and the Sheriff executes the last first by making Sale of the Goods, such Sale will stand good; and the Tender shall hold the Goods against him who first delivered the Writ to the Sheriff, and his Remedy is only by Action against the Sheriffs.

But if two Writs of Execution are delivered to the Sheriff on the same Day (as in the present Case) he hath not Election which to execute first, but is bound to give Preference to that which was first delivered; but if in fact he execute that first, which was last delivered, and make Sale of the Goods, as in this Case was done to the Plaintiff; the Tender hath a good Title to them, which cannot be defeated by a subsequent Execution of that Writ which was first delivered.

But the Party concerned in such Writ, is put to his Action against the Sheriff, and the Reason is for the Quiet of Purchasers under Sheriffs upon Executions, for otherwise it would be dangerous to make such Purchases of Sheriffs, and that might make Writs of Execution of no Effect.

Dr. Groenvelt *versus* Dr. Burnell, & al'.

THE Plaintiff brought his Action against the Defendants (who were late Censors of the College of Physicians in London) for false Imprisonment, which was by Colour of Proceedings had before them in that College, and that the Plaintiff had requested of the present Censors to have a Copy of the said Proceedings, but they denied to give him any Copy thereof, &c.

Where a Copy of Proceedings shall not be delivered till after Issue joined.

Wherefore he now moved for a Rule of Court to the Censors, &c. to cause a Copy of the said Proceedings to be delivered to him (the Plaintiff) at his own Charge.

See Preface to 10 Report upon 46 Ed. 3.

But this was opposed, because there was only a Plea pleaded, but no Issue joined, therefore the Plaintiff may demur if he think fit.

Sed per Curiam, 'Tis usual to make such a Rule for the sake of Evidence after Issue joined, but not by way of assisting the Defendant to plead.

'Tis likewise usual for the Judges of Oath Delivery to deny a Copy of an Acquittal to him who intends to bring an Action thereon, when there was a probable Cause for a criminal Prosecution, for the Court will never help any litigious Suit.

The Court denied to make any Rule in this Case.

The King *versus* Greep.

THE Defendant was indicted for Perjury in giving Evidence for the Earl of Mountague in the great Cause between him and the Earl of Bath, concerning the Duke of Albermarle's Estate, which was tried at the Common Pleas Bar in Replevin, wherein the Issue was, Whether the late Duke of Albermarle died seised in Fee of Lands, &c. or not.

3 Mod. 233. Salk. 513. Indictment for Perjury wherein the Perjury was too generally assigned.

And to prove that he did not die seised in Fee, a Deed of Settlement was produced, by which he was made Tenant in Tail, Remainder in Fee to the Earl of Bath, to which Deed one Richard Strode of Newnham in Devon, (amongst others) was a Witness, who made Oath of the Execution of that Deed by the Duke here in Town, at his house called Albermarle House.

* As a Witness for the Ld. Mountague who claimed under a Will made by the Duke, &c.

In Opposition to which Oath the Defendant Greep was * produced, who swore that at the Time this Deed bore

Date

Date, the same Richard Strode was at Newnham, and for this he was indicted for Perjury, and convicted; and now it was moved in Arrest of Judgment, for that the Perjury was too generally assigned, (viz.) That the Defendant Greep had deposed that Richard Strode tali die, &c. was at Newnham, * (innuendo Newnham, the House of the said Richard Strode in Com. Devon.) ubi revera & in facto the said Richard Strode eodem die, &c. non fuit apud Newnham prædict; now this Innuendo was not sufficient to ascertain that which of it self was uncertain; and for that the Assignment of the Perjury related only to that Newnham mentioned in the Innuendo, which was Newnham, the House of Richard Strode in Com. Devon, and that was more than the Defendant had sworn, that being that he tali die, &c. was at Newnham generally, without any Addition.

* 3 Cro. 428.
Hob. 6.
Gouldf. 191.
4 Rep. 17.

And for this Reason the Judgment was arrested, and Justice Eyre in his Argument held, that if a Man swears falsely in a Matter which is not material to the Issue, 'tis not Perjury, and to prove that Matter, he cited the Cases in the * Margin; and moreover, that the Statute 5 El. against Perjury pursues the Common Law, and adds nothing new but the Penalty; and that in this Case, the Matter in which the Perjury was assigned was immaterial to the Issue; and therefore no Perjury punishable by Indictment.

* 3 Inst. 164.
2 Bullst. 130.
Hob. 53.
11 Rep. 113.
1 Cro. 353.
Palm. 135.
2 Roll. Rep. 41.
369.
Yel. 111.
Stile 136.
† Het. 97.
1 Cro. 352.
Stile 336.

Sed per Holt Ch. Justice, 'tis Perjury to swear falsely in any Circumstance which conduceth to the Issue, or to the Discovery of the Truth; but where 'tis only in some impertinent or minute Circumstance (as where the Witness dined such a Day) which is usual amongst the Vulgar in giving Evidence; 'tis not Perjury because it doth not conduce to the Issue, or to the Truth of the Matter to be tried.

3 Cro. 46.
426.
The King
vrr. Bolt.

But if the Credit of a Witness is in Question, and another Person to support it swears, falsely this is Perjury; and he said the same Certainty is required in an Indictment for Perjury at Common Law as there is upon the Statute 5 Eliz. because that Statute doth not make any Thing Perjury which was not so before; 'tis true if a Man is convicted of Perjury at Common Law, the King may pardon him, but if upon the Statute he cannot.

2 Leon. 201.

And this Judgment being arrested and entered of Record, a Writ of Error was brought in the House of Lords, and in Hillary Vacation, anno 10 Will. it was reversed, and the Defendant was taken, &c.

Thermolin *versus* Sands.

THE Case, *ff.* The Defendant had seized a Ship by Virtue of a Process out of the Admiralty; and upon that Seizure the Plaintiffs libelled in the Court of Admiralty, setting forth, that they were Proprietors of the said Ship, and that she was taken out of their Possession by Violence; but this was not laid to be *super altum mare*.

Libel in the Admiralty, but did not set forth that the Ship was taken upon the High Sea.

Whereupon Thermolin came in and claimed Property, setting forth, that the said Ship was taken as Prize in the French War by one Dubart, a French Captain, of whom he bought her at Bergen, and that she was taken upon the High Sea near Norway.

Upon this they proceeded to Proof, and such Taking up on the High Sea was proved; but because there was no Sentence of Condemnation by the Court of Admiralty in France against this Ship as Prize, or at least no such Sentence could be made out, our Court of Admiralty decreed the Ship to the Defendant Sands, &c. the old Owner, from which Decree Thermolin appealed to the Delegates; and now moved for a Prohibition, upon a Suggestion, that the Suit there was but in Nature of a Trover or Detinue; and he relied on the Case of * Radley and Eggesfeild.

* 1 Vent. 173,
308. S. C.
2 Lev. 25.
S. C.
2 Saund. 259.
S. C.
1 Sid. 367.
1 Roll. Abr.
318.
Cro. Car. 97.

But on the other Side it was said, that there is a Difference between the old Proprietor, and he who is Vendee of a Prize under a Sentence of the Admiralty, for the Vendee may well pursue there upon the Seizure of such Ship, because 'tis but as an Appendix to the precedent Sentence under which he claims; and in this Case a Prohibition ought to go, because upon the Face of the Libel it doth not appear, that the Capture from the Defendants was *super altum mare*.

Econtra.

To which it was answered, that in those general Libels against a Ship, 'tis not the Course of the Admiralty to lay the Capture to be *super altum mare*.

Besides, if it was the Course, this Defect is helped by the Plea of Thermolin in the Admiralty Court; and by the Proofs taken there, by which the Taking was confessed, and proved to be upon the High Sea, &c.

And the Court was divided, (*viz.*) Holt Ch. Justice and Rokesby were for the Prohibition, because of that Defect in the

the

the Libel, but Turton and Eyre contra; for they held that the Pleading and Proofs had supplied that Defect; so no Rule for a Prohibition.

Shadow *versus* Painter.

Where the
Plaintiff had
full Costs.

TRESPASS Quare warrenam & clausum ipsius (the Plaintiff) fregit & intravit & herbas depast. &c. ac in eadem Warrena & clauso cum canibus cuniculosis, Anglice, Coney-dogs, venebatur, Anglice, did hunt, sine licentia & contra voluntatem ipsius (the Plaintiff) eodem (the Defendant) existen. Artifice inferiori, (viz.) Fabre Ferrario & non existen. qualificat. ad servand. canes cuniculosos & alia enormia, &c.

After a Verdict for the Plaintiff, and 7 s. Damages, it was moved, that the Plaintiff ought not to have full Costs upon the new Statute.

(1.) Because the Matter is not laid contra formam Statuti.

(2.) Because 'tis not laid, that the Defendant hunted and killed any Game, but only that he hunted, generally.

Sed non allocatur; so the Plaintiff had Judgment, &c.

Beresford's Case.

Suit upon
the Writ de
libertatibus
allocandis.

MR. Beresford, as Deputy Bailiff of the Liberty of Taunton-Dean, under the Bishop of Winchester, had sued out a Writ de libertatibus allocandis, directed to the Sheriff of Somersetshire, thereby reciting, Quod constat Regi, that his Progenitors by several Charters, had granted to the Bishops of Winton the said Liberties, with the Execution and return of all Writs within the Precinct, &c. and that the said Bishops had enjoyed the same accordingly, &c.

To this Writ the Sheriff made this Return, (viz.) Quod non apparet mihi, that there were any such Charters as in the Writ mentioned; & ulterius, that the present Bishop of Winton, or his Predecessor, never enjoyed such Liberties, &c.

And now it was moved for a Rule on the Sheriff to amend this Return, but the Court would make no Rule, because it was an extraordinary Course to try the Right of Liberties

Liberties in an Action for a false Return of a Writ; whereas, if the Plaintiff is aggrieved, he may bring an Action against the Sheriff for infringing his Liberties, &c.

Turbervill versus Stamp.

CASE, &c. wherein the Plaintiff declared, that the Defendant ignem suum apud such a Place tam negligenter & improvide custodivit quod perinde the Plaintiff's Field, containing so many Acres of Furze, was burnt and consumed.

1 Salk. 13.
Action for
negligently
Keeping his
Fire in a
Field.

Upon Not guilty pleaded, the Plaintiff had a Verdict; and now it was moved in Arrest of Judgment, that this Action would not lie, because it was founded only on the Negligence of the Defendant; and an Action cannot be maintained upon such Negligence, unless there is a Trust reposed in the Defendant, or upon the special Custom of England, which implies a Trust, but that extends no farther than to the Fire in a Man's House, and not to a Fire in the Field, as this Case was, for the Defendant, in a proper Season, did set Fire to some Heath and Furze in his own Ground, which Fire was by a sudden Wind carried over into the Plaintiff's Close adjoining, tho' the Defendant's Servants did all in their Power to prevent it, but wanted Number.

Wherefore it was insisted for him, that if an Action would lie, it must be upon the special Matter, and not upon the Negligence.

But it was argued for the Plaintiff, that the Defendant is as much obliged to take Care of his Fire in the Field as he is in his House, and that the common Custom of England, which is the Common Law, extends as well to the one as to the other; and the Cases in the *Barrington were cited, where in the Declaration the Fire was not alledged to be in a House, but generally at such a Place; and the Court being of this Opinion,

Judgment was given for the Plaintiff.

* 2 H. 4. 18.
14 Assise
pl. 9.
Fitz. Abr. tit.
Issue, pl. 88.
Double Plea
31.
28 H. 6. 7.
31 H. 6. 11. b.
Old. Entr.
219.
Rast. Entr. 8.

Sanders *versus* Owen.

2 Salk. 467.
S. C.
5 Mod. 386.
S. C.
† 1 Will. 3.
cap. 21.
A verbal Ap-
pointment of
a Clerk of
the Peace
by the Custos
is sufficient.

THE Case, ff. The Earl of Winchelsea being Custos Rotulorum of the County of Kent, after the Making the new Statute * 1 Will. 3. concerning the Nomination of the Custos Rotulorum, and Clerk of the Peace for every County, he 15 Julii, 1 Will. 3. in open Sessions then held for that County, when the Defendant Owen was present in Court, said these Words, (viz.) I do nominate the said Philip Owen to be Clerk of the Peace, according to the Act of Parliament; whereupon he was forthwith admitted and sworn into the Office, and executed it during the Life of the Earl of Winchelsea.

After whose Death the Lord Rumney was appointed Custos Rotulorum, and he by Deed granted this Office to Saunders, who entered and dispossessed Owen, who brought an Assise in the County of Kent, all which Matter was found specially before the Chief Baron Ward, who adjourned the Assise into the Court of Common Pleas, where the single Point argued was:

ff. Whether by Virtue of this Statute the Custos Rotulorum might nominate and appoint a Clerk of the Peace by Parol, without any Deed or Writing.

And it was adjudged in that Court for Owen, the Plaintiff in the Assise, (viz.) That a verbal Nomination was sufficient; whereupon a Writ of Error was brought in B. R. and after several Arguments, the Court una voce agreed, that a parol Nomination was sufficient.

But yet the Court of B. R. reversed the Judgment, because the Form of the Words used by the Earl of Winchelsea in the Nomination of Owen, was insufficient, for he did not name any certain County of which he should be Clerk of the Peace, nor distinguish what Statute he intended, for there are † two Statutes which concern this Matter; and moreover, by his adding this Word, (viz.) said Philip Owen, 'tis altogether insensible.

Upon this Judgment a Writ of Error was brought in the House of Lords, and there the Judgment of B. R. was reversed.

† 27 H. 8.
1 Will. 3.

Winter versus Lovedaz.

IN a special Verdict in Ejectment, the Case appeared to be as followeth: George Powlett being seised in Fee of the Manor of Gotehurst in Somersetshire, did upon the Marriage of his Son, settle the same to the Use of himself for Life; and afterwards to the Use of his Wife for Life, then to the Use of his Son in Tail, and for Want of such Issue to his own right Heirs, in which Deed of Settlement there was this Proviso.

3 Mod. 244,
378. S. C.
2 Salk. 537.
S. C.
Copyhold
Lands are
Parcel of
Demesnes of
a Manor.

That it should be lawful for the said George Powlett during his Life, and for his Wife after his Death, during her Life, by Deed indented, to make Leases either in Possession for the Term of one, two, or three Lives, or for the Term of thirty Years, or for any other Term or Terms, Number or Numbers of Years, determinable upon one, two, or three Lives, or in Reversion for one or two Lives, or for thirty Years, or for any other Term or Number of Years determinable upon one or two Lives, so as such Demise be not made of any the ancient Demesne Lands, Parcel of the said Manor, or of any other Lands which for the Space of seven Years had been used as Demesne Lands, and so as the ancient Rent was reserved.

It was found that the Lands now in Question were Copyhold Lands, Parcel of the said Manor, and being in the Tenure of Richard Blanchflower, for the Term of two Lives, by Copy of Court-Roll under a certain Quit-Rent, he the said George Powlett (after the said Settlement) made a Lease thereof to Robert Blanchflower by Deed indented, for thirty Years absolute, to commence after the two Lives then in Being, reserving the same Rent as in the Copy to Richard Blanchflower.

The two Lives being now dead, the Lessor of the Plaintiff claimed as Heir in Tail to his Grandfather George Powlett, by Virtue of the said Settlement; and the Defendant claimed the Term of thirty Years under Robert Blanchflower.

There were two Points made in this Case.

(1.) Whether these Lands being Copyhold were within the Intent of this Proviso which gave the Power of Leasing, especially since all the Demesne Lands of the Manor were excepted out of the Power; and all Copyhold Lands are * Demesnes, for 'tis an inseparable Quality of every Copyhold, that it was Time out of Mind Parcel of the Manor.

* *Nota*, It was found, that there were other Lands which the Lords of this Manor used to hold in Demesne.

(2.) If Copyhold Lands should be within this Power, then whether such Power is well pursued by this Lease for 30 Years absolute, or whether this Lease doth not exceed the Power, because it should have been for 30 Years, or for any other Number of Years determinable upon the Death of One Life, being a Lease in Reversion after two Lives in Possession.

And after several Arguments at the Bar, the Court gave their Opinion seriatim, (viz.) Holt Chief Justice, Turton and Eyre for the Defendant, (viz.) That Copyhold Lands were not within the Power of Leasing, because they were within the Exception of all Demesne Lands; but as to the second Point, they held that a Lease for 30 Years absolute in Reversion after two Lives might be made by George Powlett or his Wife, of any Lands which were in their Power of Leasing.

Power of making Leases doth not extend to Copyhold.

But Justice Rokesby was of another Opinion in both Points, for he held first that Copyhold Lands were not within the Intent of this Proviso; and that if the Demesne Lands had not been excepted by express Words, yet the Power of Leasing would not have extended to them; for if it did, it would destroy the Tenure, because Copyhold Lands once leased, are for ever enfranchised; and therefore it shall never be presumed, that the Tenure was intended to be destroyed without express Words of the Parties for that Purpose.

(2.) As to the second Point, all Leases to be made by Virtue of this Power for 30 Years, or any other Number of Years, ought to be determinable upon the Death of one, two, or three Lives, as the Case shall happen with respect to the present Possession, and to the Reversion; and because this was a Lease in Reversion after two Lives in Possession, and for 30 Years absolute, therefore 'tis not good, for it ought to be for 30 Years, if one Life lived

so long, there being two Lives then in Being; for otherwise there will be no Proportion between a Lease for one Life in Reversion after two Lives in Being, and a Lease for thirty Years absolute, in Reversion after two Lives, for thirty Years is always accounted an Equivalent to three Lives in Possession; therefore for this Reason also the Lease made by George Powlett is void.

Et per Holt Chief Justice arguendo, A Lease made to commence at any Day to come is properly a Lease in Reversion, but in this Case it signifies a Lease to commence after some Interest in Being at that very Time when the Lease in Reversion was made. 1 Inst. 54.

That this Power to Lease for Life in Reversion must be taken to be a Lease of the Reversion it self, and not a concurrent Lease, and it cannot be otherwise, because a Freehold cannot commence in futuro.

And where there is a Power given to make Leases in Possession and Reversion, in such Case if a Lease is made in Possession, and afterwards some Life drops, he cannot make a new Lease in Reversion of the same Lands, because his Power is executed by making the first Lease. 2 Roll. Abr. 262.
And Hill. 27, 28
Car. 2. Walker *versus* Walker.

That where a Qualification is annexed to a Power of Leasing, which if observed goes in Destruction of the Power, the Law will dispence with such Qualification.

As for Instance; Where there is a Power to make a Lease of a Manor, or of any Part thereof, so as the ancient Rent is reserved, yet he may by this Power make a Lease of the Services, Parcel of the Manor upon which no Rent can be reserved, otherwise the express Power would be defeated.

The Plaintiff had Judgment.

Ashton *versus* Sherman & ux'. Intratur Hill.
8 Will. 3. B. R. Rot. --- But adjudged, Michaelmas 9.

DEBT upon a penal Bill of Thirty Pounds against Sherman and his Wife as Administratrix to William Feild.

An Administratrix sued, pleaded several Judgments,

and concluded to the Country, when it should be & hoc parat' est Verificare.

The

The Defendants pleaded in Bar a Judgment for 400 l. recovered against him and her as Administratrix, &c. by Robert Waring, and another Judgment upon a Bond for 100 l. recovered against them by Gilbert East; another Judgment upon Bond for 100 l. recovered against them by Margaret Barton, Widow; another Judgment upon Bond for 100 l. recovered against them by Nathaniel Axtell; another Judgment upon Bond for 20 l. by Nathaniel Hickman; and another Judgment upon Bond for 100 l. at the Suit of Henry Cornish, and that they had not Assets, but of the Value of 10 l. which were not sufficient to satisfy those Judgments.

The Plaintiff replied *præcludi non*, &c. quia quoad the Judgment for 100 l. recovered by Gilbert East, there was but thirty Pounds of it a just Debt, which was satisfied after the said Judgment obtained; and that the Defendants kept that Judgment on Foot by Fraud to deceive their Creditors, & hoc paratus est verificare unde petit iudicium & debitum suum prædict' una cum damnis suis occasione detentionis debiti illius sibi adjudicari, &c.

Et quoad the Judgment recovered by Henry Cornish, that only 28 l. of it was a just Debt, which he was always ready and offered to accept in full Satisfaction and Discharge of the Judgment for 100 l. and that the Defendant delayed the Payment thereof, and kept that Judgment on Foot by Fraud, & hoc, &c. and concluded *ut supra*.

Et quoad the Judgment of 100 l. recovered by Margaret Barton, that but 30 l. of it was a just Debt, which was paid since the Judgment, and that it was kept on Foot by Fraud, & hoc, &c. and concluded again *ut supra*; the like as to the Judgment recovered by Hickman, that it was all paid with the like Conclusion, &c.

Et prædict' Nicholas Ashton ulterius dicit quod præfat' Johannes & Maria, (the Defendants) die exhibitionis of the Plaintiff's Bill, had divers Goods and Chattels, which were the Intestate's at the Time of his Death, in their Hands, to be administered to the Value of the Debt demanded by the Plaintiff præterquam bona & catalla sufficien' to satisfy the said Robert Waring and Nathaniel Axtell of their Debts recovered as aforesaid; and also to satisfy the said real Debt of 28 l. due to Henry Cornish (*scil't apud H. in Com. W.*) & hoc petit quod inquiretur per patriam.

And upon a Demurrer to this Replication, it was much insisted on, that it was naught, because of the several Conclusions, Et hoc, &c. Unde petit judicium, &c. which were severally made after the Pleading the Frauds to the several Judgments; for as this Replication had but one Commencement, with a Præcludi non, &c. so it ought to have been concluded with one Averment, (viz.) Et hoc parat. est verificare, and Prayer of Judgment.

Sed non allocatur, upon the Authority of the Cases cited in the * Margin.

Case. 9 Rep. Meriell Tresham's Case. 1 Saund. 336. 2 Saund. 49.

* 8 Rep. Turner's

Then it was objected, that in this Replication the Plaintiff had made an ill Conclusion as to that Part of it, wherein he had alledged, that the Defendant had Assets ultra the Debt due to Waring and Axtell, &c. by putting that Matter to be tried by the Country, for he ought to have concluded with an Averment, (viz.) Et hoc paratus est verificare, so as to give Leave to the Defendants to rejoin to this new Matter.

To which it was answered, that the Defendants in their Plea have positively alledged, that they had no Assets, but only to the Value of 10 l. and therefore they could not depart from that Allegation; and so here a good Issue was offered by an Affirmative to a Negative, and therefore the Replication ought to conclude to the Country; and so it was in the Case of * Hancock and Prowte.

* 1 Saund.

Sed per Holt Ch. Justice, who gave the Rule, this Replication is naught for the Reason supra, for since the Plaintiff had undertaken to answer those Judgments to Waring and Axtell, and the 28 l. to Cornish, by an Allegation of Assets ultra those Debts, he ought to have concluded with an Averment, so as the Defendants might have rejoined.

336.

And moreover, in this Case, it was not necessary for the Plaintiff, in his Replication, to make a particular Answer to every one of the Judgments pleaded in Bar to the Action; for if the Plea is falsified in one Part, 'tis naught in the Whole, and therefore he held, that in this Case the Plaintiffs might have omitted to give any Answer to the Judgments of Waring and Axtell, and have rested upon the other Matters pleaded to the other Judgments, without going farther.

Judgment was given against the Plaintiff for the Reason supra.

Sparks

Sparks *versus* Crofts.

The Defendant was sued as general Administrator, and pleaded in Abatement, that he was a special Administrator, &c.

ACTION against the Defendant as general Administrator. He pleaded in Abatement, that he was but a special Administrator during the Minority of his Wife, but did not aver, that she was still under Age; and for that Reason there was Judgment against him to answer over.

Then he pleaded in Bar, that Puis darrein Continuance his Wife died, which was from the last Term; but this was over-ruled, because it was contrary to what was now admitted on Record; so Judgment was given against him.

Gale *versus* Noble.

Lands granted tenendum secundum consuetudinem Manerii are not Copyhold, but customary Freehold.

See 5 Rep 84. Perriman's Case. 2 Vent. 144.

UPON a Trial at Bar in Ejectment for Lands, Parcel of the Manor of Cornham in Wilts, which by very antient Books of that Manor, appeared to be Parcel of the Duchy of Cornwall, and still pass by Surrender and Copy of Court-Roll, but yet are not Copyhold, because it did not appear in any of the Rolls or Copies now produced, that they are granted ad voluntatem Domini Manerii, but only tenendum secundum consuetudinem Manerii; therefore it was resolved by the Court, that these Lands are not Copyhold, but a customary Freehold; and for that Reason the Verdict was for the Plaintiff, against whom the Verdict was found at the Nisi prius for a Forfeiture by committing Waste, the Plaintiff in that Action taking it to be Copyhold, as all the Tenants had constantly done.

Dawny *versus* Cashford.

Prescription by a Que Estate of a Term for Years, not good.

CASE, &c. for Stopping a Way, in which the Plaintiff declared, that he was possessed of such a Messuage for the Residue of a Term for Years yet to come, and Time out of Mind had used to have a Way leading to such a Place, which the Defendant had stop'd, &c.

Upon Not guilty pleaded the Plaintiff had a Verdict; and it was now moved in Arrest of Judgment, that here was a Prescription by a Que Estate of a Term for Years; besides here was a Terminus ad quem, but no Terminus a quo the Way did lead.

As to this last Matter it was held, that the Defect was cured by the Verdict, but the first was an incurable Fault; so the Judgment was arrested.

Bonner *versus* Hill. Intratur Mich. 9 Will. 3.
B. R. Rot. 558.

THIS was an Action on several Promises, &c.

The Defendant pleaded in Abatement a frivolous Plea, (viz.) That the Plaintiff had impleaded him in the Court of Common Pleas pro eadem causa actionis.

Where a Replication is well concluded in Bar.

The Plaintiff replied Nul tiel Record in the Court of Common Pleas, and concluded his Replication in Bar, (viz.) Unde petit judicium & damna sua, &c.

And upon a Demurrer to this Replication it was insisted, that the Action was discontinued; and the Case of ** Biss and Harcourt* was cited as an Authority in Point.

See antea *Carter versus Davis.*
* Antea.

Sed per Holt Ch. Justice, This Case differs from that, because here the Plea is ill, and the Judgment in this Case was upon the Insufficiency of the Plea.

But in that Case the Plea was good, and the Judgment was upon the Replication, for that the Plaintiff had thereby prayed a wrong Judgment.

And he said, that if Matter of Fact is pleaded in Abatement triable per Pais, the Plaintiff may conclude his Replication in Bar, because final Judgment is to be given after a Verdict in that Case.

Therefore the Rule was, that the Defendant answer over.

Whitechapel Parish *versus* Stepney Parish. Pas.
1 Will. 3.

THE Case was, one Borer had two Children, both born in the Parish of Whitechapel; the Father died, and the Mother married again, and not long afterwards the Husband and Wife ran away, and deserted these Children, who were afterwards privately drop'd in the Parish of Stepney, one of them being two Years old, and the other four Years old; whereupon the Children were by Order of two Justices removed to Whitechapel, but that

Where the Parent is a Vagabond, the Birth of a legitimate Child gains a Settlement where born.

Order was vacated upon an Appeal; and the Reason expressed in the Sessions Order was, because Stepney could not prove, that Borer the Father of the Children was ever legally settled in Whitechapel, tho' in the same Order it was acknowledged by express Words, that both the Children were born in Whitechapel.

And now it was moved to quash this Order of Sessions, the Question in Law being, if the Birth of these legitimate Children shall gain a Settlement of them where the Parent is dead, and the Place of his last Settlement unknown, and so must be esteemed as a Vagabond.

It was agreed by all, that the Birth of a Bastard-child gains a Settlement for that Child, and also that a legitimate Child gains no Settlement by its Birth, when the Place of the Parents last Settlement is known, but that such Child must follow the Settlement of the Parent.

Sed per Curiam, This Order of Sessions was quashed, and the Order of the two Justices confirmed, because where the Parent is a Vagabond, the Birth of a legitimate Child gains a Settlement; otherwise it will be born a Vagrant.

D E

Term. Sanct. Hill.

9 Willielmi 3. B. R.

Thompson *versus* Leach.

IN Ejectment at a Trial at Bar, a special Verdict was found, the Substance whereof was as followeth:

If. That Nicholas Leach was seised in Fee of the Lands now in Question, lying in Devonshire, who by his last Will devised the same to his Brother Simon Leach for Life; and after his Death to his first, and every Son in Tail; and for Want of such Issue, then to the Defendant Sir Simon Leach in Tail, Remainder to his own right Heirs.

That Nicholas died seised, that Simon his Brother entered and was seised for Life, and married, and his Wife being great with Child, and within three Months of the Time of her Delivery, the said Simon her Husband by the Persuasion of Unton Croke (whose Daughter he married) executed a Deed to the said Unton Croke, to the Use of the Defendant Sir Simon Leach, which said Deed purported a Surrender of all his Messuages, Lands and Tenements whatsoever unto the Defendant Sir Simon Leach, without any Consideration.

That within three Months afterwards a Son was born, and named Charles Leach, who was the Lessor of the Plaintiff.

That about five Years afterwards, and not before, the Defendant Sir Simon Leach had Notice of this Deed of

3 Mod. 301.
Surrender
made by an
Idiot is void
in Law.

Surrender, and then he assented to it, and entered, and had the Possession.

That Simon Leach the Father was not Compos mentis at the Time he executed the said Deed of Surrender, and that he was now dead, and that Charles Leach (the Lessee of the Plaintiff) was his Son and Heir.

The Question upon this special Verdict was, Whether this Deed of Surrender was void ab initio, or only voidable by way of Plea, or by Sci. fa. for the King, in the Life-time of Simon Leach the Lunatick; for if it was at any Time effectual to merge the Tenancy for Life of Simon Leach the Father, before the Birth of his Son, then the contingent Remainder would be destroyed; and tho' this Surrender should be afterwards avoided by any Means in Law; yet the contingent Remainder being once extinct, could not be revived by any Matter ex post facto.

* 4 Rep.

Another Point was made, upon which this special Verdict was found, and which did arise from the Difference taken in * Beverley's Case, (viz.) Because Charles Leach claimed by way of Remainder, and not as Heir at Law, and so only privy in Estate, who (as that Book is) cannot avoid the Acts of an Idiot.

Sed per Curiam, This Surrender is void ab initio, and never had any Effect in the Law, because of the Ideocy of him who executed it; and therefore any Person may take Advantage of it.

That there is a Difference between a Feoffment and Liberty made propriis manibus of an Idiot, and the bare Execution of a Deed by Sealing and Delivery thereof, as in Cases of Surrenders, Grants, Releases, &c. which have their Strength only by executing them; and in which the Formality of Liberty and Seisin is not so much regarded in the Law; and therefore the Feoffment is not merely void, but voidable; but Surrenders, Grants, &c. by an Idiot, are void ab initio.

The Plaintiff had Judgment.

Courtney *versus* Connet.

Trespas and Case cannot be joined in the same Action.

Trespas brought by Sir William Courtney against the Defendant quare vi & armis clausum ipsius (the Plaintiff) fregit & in solo effodit ac pisces suos cepit, necnon de eo quod (the Defendant) quasdam exclusas & defensas cujus-

cujusdam cataraete fregit attollit & substraxit per quod Aqua ab eadem cataraeta decurren' piscariam & stagnum ipsius Willielmi ibidem in tanto inundavit quod per Cursum aquae illius & inundationem praedict' non solum pisces in piscaria & stagno praedict' existen', videlicet, (so many Trouts, &c.) ad Valentiam, &c. exiverunt verum etiam idem Willielmus & servientes sui a captione piscium in eisdem piscaria & stagno existen' impedit' & obstruit' fuerunt, &c.

Upon Not guilty pleaded, the Plaintiff had a Verdict, and it was moved in Arrest of Judgment, that this last Part of the Declaration was in Trespass upon the Case, and the first Part was a meer Trespass which could not be joined in one Action, because it was incompatible.

But after several Debates, the Plaintiff had his Judgment; for per Curiam, this last Matter was in its Nature a Trespass as well as the first.

Morrice versus Golder.

IN Replevin, &c. The Defendant avowed the Taking, &c. for so much Rent due in Money, and also for so many Hens, and after Issue joined, and a Verdict for the Avowant, it was moved in Arrest of Judgment, for that upon the Face of this Avowry it appeared, that the Hens were * not due at the Time of the Distress taken, and here the Damages and Costs were entire.

Where the Damages and Costs were entire, and the Plaintiff released Part of the Damages after a Verdict, good.

* Hob. 133. 1 Brownl. 179. 9 H. 7. 4. 11 Rep. 45. b. 11 H. 6. 55. a. 3. a. b. 9 H. 7. 13. a. 2 Inst. 503. 1 Send. 282.

But the Plaintiff offered to release the Damages, and also Rent for the Hens, and take Judgment only for the Rent in Money, which was opposed, unless the Plaintiff would likewise release the Costs.

To which it was answered, that there was no Necessity of releasing the Costs, and to prove it a * Case was cited, and a Copy of the Record was produced, where in the like Case, the Rent which was not due, and all the Damages were released, and the Avowant had Judgment for the Residue, and also for all the Costs.

* Byrnes ver. Newton. Trin. 28 Car. 2. B. R. Rot. 728.

And the Court was of that Opinion in the principal Case; wherefore the Avowant entered a Remittitur of all the Hens and the Damages, and took Judgment for the Rent in Money.

Brewster

Brewster *versus* Kidgell.

3 Mod. 368.
1 Salk. 198.
Covenant
that an An-
nuity shall
be paid clear
of all Taxes,
in such Case
the parlia-
mentary
Taxes shall
be intended.

* See Giles
vers. Hooper,
antea.

IN a Special Verdict in a feigned Action the Case was thus :

ff. That Robert Langford 5 Nov. 1649. in Consideration of 800 l. by him received of Ellen Brewster, Widow, did by his Deed grant to her and her Heirs a Rent-Charge of 40 l. per ann. to be issuing out of his Manor of Butlers in Bucks, with a Clause of Distress, and a Covenant for farther Assurance.

That upon this Deed, these Words were endorsed, (viz.) * Memorandum, It is the true Intent and Meaning of these Presents, that the said Ellen Brewster, her Heirs and Assigns shall for ever hereafter be paid the said Rent-Charge without any Deduction or Abatement of Tax, Charge or Payment out of, for or concerning the said Rent, or the said Manor or Lands charged therewith, which Endorsement was signed, Robert Langford.

That afterwards 8 July 1652. the said Robert Langford by another Indenture enrolled in Chancery, did give, grant and confirm the said Rent unto the said Ellen Brewster and her Heirs, and thereby did covenant with her, that the said Rent of 40 l. per ann. freed of all Taxes, should be for ever after duly paid at the Times and Places of Payment thereof.

Then the Jury concluded specially, that if the Court should be of Opinion, that it was not lawful for the Tenant to abate, deduct, and retain in his Hands (in respect to the Tax payable to the King, &c. by Virtue of the Acts of Parliament by which 4 s. per Pound were given) for the Arrears of the said Rent for two Years and an Half ended on the 20th of May before, then they found for the Plaintiff, otherwise for the Defendant.

The Question was, Whether the parliamentary Taxes ought to be deducted out of this Rent-Charge pro tanto, or that the Rent was payable free of all Taxes, as well parliamentary as other Taxes.

Et per Curiam, (after several Arguments) this Rent was payable free of all Taxes, and that no Deduction could be made by the Tenant for the parliamentary Taxes of 4 s. per Pound.

It was presumed, that the Indorsement of the Memorandum on the first Deed concerning the Payment of the Rent-charge, without Deduction for Taxes, was made and indorsed before that Deed was executed, and so was Parcel thereof; and the rather, because that Matter was pursued by the Covenant in the second Deed.

Et per Holt Ch. Justice, Who delivered the Opinion of the Court, the special Reason of the Judgment, and which governed this Case, was grounded upon the Circumstance of Time, when this Grant was made, which was Anno 1649, for at that Time those parliamentary Taxes now in Use were first invented, and one of them was at that Time in Being.

But if this Grant had been in the Year 1640, which was before these Sort of Taxes began, then he should have been of another Opinion, for at that Time, and likewise sometime before, the Taxations were by Way of Subsidies, Tenths, and Fifteenths, and it would be hard to extend the Word Taxes to such Impositions which were not in Use at the Time of the Grant; and if a Tax had been given by the Parliament for rebuilding St. Paul's Church, that would have been out of this Covenant. ^{2 Inst. 76, 77.}

But now these parliamentary Taxes have a Sort of Existence at all Times, because the constant Revenues of the Crown have been found not to be sufficient for the Emergences of the Government, and therefore these Taxes came in from Time to Time as a Supply; and the King may grant by Patent, that a Man shall be acquitted of a future Tax to be given by Parliament, therefore such Taxes do in some Measure exist, otherwise such a Grant would be void. ^{19 H. 4. 61.}

The Word Taxes comprehends Rates for the Church and Poor, and those Rates imposed by Commissioners of Sewers.

That tho' the Act, which gives 4 s. in the Pound, hath a Clause, that the Certenant shall deduct it out of the Rent charged thereon, yet that doth not repeal the Covenant to pay it without Deduction, for he doth not offend the Statute if he doth not deduct; but he breaks his Covenant if he doth deduct, wherefore his Covenant ought to be performed.

Moreover, the Words of this Covenant, (viz.) To pay the Rent-charge without any Deduction for Taxes, can have no other Respect but to parliamentary Taxes, for the Certenant

Certenant hath no Power to deduct in any other Case whatsoever, and therefore if the Covenant did not extend to those Taxes, it would be of no Use.

The King versus Bishop of Chester.

3 Mod. 297.
2 Salk. 360.
An Esquire
may take by
a Grant to
him by the
Name of
Knight, tho'
that being a
Name of
Dignity, is
Parcel of his
Name.

WRIT of Error upon a Judgment in C. B. in a Quare Impedit, and after several Arguments it was reduced by the Court to a single Question upon the Pleading, as it appeared on the Record.

The Title against the King was by Virtue of Letters Patents made by Car. 1. by which the Abbotsdon, &c. was granted Willielmo Theackstone tunc Armigero & postea Militi; and upon Oyer of the Letters Patents they were recited in hæc verba, by which it appeared that the Grant was made to William Theackstone, Knight; and the Question was, Whether this could be intended the same Person.

2 Inst. 383,
394, 666.

Et per Holt Chief Justice, It could not be intended the same Person, because Knight is a Name of Dignity, but Armiger or Esquire, a Name of Worship; and if he is afterwards made a Knight, the Name of Esquire is thereby extinguished; and therefore a Grant made by the King to William Theackstone, Knight, when there was no such Man a Knight, was a void Grant, and William Theackstone Esq; could not take thereby, because Knight is not an Addition, but Part of a Man's Name, for it being a Name of Dignity, it becomes as much a Part of a Man's Name as his Name of Baptism; and for that Selden's Title Honour, &c. was cited.

2 Cro. 679.

That a Man who is reputed a Knight, but in Truth is not so, cannot take any Thing by Way of Grant, by the Name of Knight; for such Grant is void, it being a Thing in Reputation, without any colourable Ground for it; but a Grant to a Duke's eldest Son, by the Name of a Marquess, or to the eldest Son of a Marquess, by the Name of an Earl (& sic de similibus) would be good, because of the common Courtesy of England, and their Places in Heraldry.

Litt. Rep.
121.
1 Bulst. 21.

Justice Rokesby was of a contrary Opinion, for he held that W. T. Esq; might take by a Grant made unto him by the Name of W. T. Knight, & sic vice versa si constat de persona ut res magis valeat, &c.

But by the Opinion of the other three Judges, the Judgment was affirmed, and thereupon a Writ of Error was brought in Parliament, where this Judgment was reversed, for in Truth it was only a Mistake of the Pleader, the said William Theackstone being a Knight at the Time of the Grant made.

Britton *versus* Cole. Intratur Trin. 7 Will. 3.
B. R. Rot. 181. and Judgment given 8 Feb.
Anno 9 Will. 3. Hillary-Term.

In Trespas for Taking his Cattle, &c.

The Defendant justified by Virtue of a Writ of *Levari facias* issued out of the Court of Exchequer, directed to the Sheriff of Somersetshire, wherein it was recited, that one Francis Criswick had been outlawed at the Suit of the now Defendant Cole; and that upon a special *Capias Uelegatum* an Inquisition had been taken and returned into the Court of Common Pleas, whereby it was found, that the said Francis Criswick, at the Time of the Outlawry, was seised in Fee of such Lands, &c. to the yearly Value of, &c. beyond Repairs; and that this Inquisition had been executed and transmitted into the Court of Exchequer; wherefore this Writ commanded the Sheriff to levy the Issues and Profits of these Lands from such a Time to such a Time, according to the Rate and Value aforesaid, and to answer it in the Court of Exchequer, &c.

1 Salk. 395.
3 Mod. 112.
The Cattle
of a Stranger
levant and
couchant on
Lands ex-
tended upon
an Outlawry
may be ta-
ken upon a
Levari facias
for the King.

That the Defendant Cole requested the Sheriff to execute the said Writ, and thereupon he made his Warrant to the other Defendants (his Officers) by Virtue of which they entered on the Lands, and there found the Plaintiff's Cattle Levant and Couchant, per quod they took his Cattle for the Issues and Profits of the Land extended, according to the Command of the Writ, &c.

To this the Plaintiff demurred, and the Point in Law in this Case was, Whether the Cattle of a Stranger, which were levant and couchant on Lands extended on an Outlawry, may be taken for the King upon a *Levari facias*, as the Issues and Profits of the Lands.

And after several Arguments, it was resolved per Curiam, that such Cattle might be taken lawfully, because the Defendant averred, that they were levant and

couchant on the Lands extended, which Averment is very necessary in this Case.

And Holt Chief Justice, who gave the Rule, gave also these Reasons for the Judgment.

(1.) First, because the Cattle are properly the Issues of the Lands, tho' they are not the Cattle of the Owner of the Lands, for otherwise there might be no Issues at all; and the King cannot intermeddle with the Soil, because nothing but the Issues thereof are forfeited upon an Outlawry; and the Cattle of the Person outlawed cannot be the Issues of his Lands, for those are forfeited to the King before; and if after the Outlawry he purchaseth any more, the Property of them is immediately vested in the King.

2 Inst. 433;
Fleta 68.

1 H. 7. 7.
19 H. 7. 30.
21 H. 7. 7.
3 Cro. 431.

(2.) The Land is Debtor to the King, therefore he may levy what shall be found levant and couchant there: And if the Person outlawed should, after the Inquisition, make a Feoffment of his Lands, the Cattle of the Feoffee may be taken for the Issues of those Lands; and if so, a fortiori the Cattle of a Wrong-doer, who hath no Pretence of a Title.

If Tenant for Life impanelled on a Jury lose his Issues by Default, the King may levy them upon the Reversioner after the Death of the Tenant for Life, because it was a Charge upon the Land.

2 Roll. Abr.
157, 159.
Lane 79.

But if Tenant for Life is outlawed and die, it may be a Question, Whether the Issues arrear can be extended on the Reversioner.

Hardres 101.
Rayn. 17.

If the Owner of the Soil is outlawed, the Cattle of a Commoner cannot be taken as Issues; but if they should be taken, he must plead his Title in the Exchequer, unless his Right of Common is found by Inquisition on the Outlawry.

Mich. 22
Car. 2. Rif-
don *versus*
Rainer.

So it is likewise if the Person outlawed do alien his Lands before any Inquisition taken for the King, which he may lawfully do, yet the Alienee must plead off the Extent in the Exchequer, by shewing his Title precedent.

* 18 Car. 2.
Hodson v.
Tobickle.

If Cattle escape into Lands charged with a Rent-charge, they may be distrained for the Rent, because the Land is the Debtor; and a * Case was now cited, where the very same Point was adjudged in the Exchequer in the Lord Chief Baron Hale's Time, and 'tis great Reason it should be so, for otherwise the Person outlawed may take in other Men's Cattle to agist, and so defeat the Outlawry, and in this

this Case, the Plaintiff might claim under the Person outlawed, for any Thing appearing to the contrary; wherefore the Plea was held good in Substance.

But then there were three Exceptions taken to the Form of it.

(1.) First, That 'tis not alledged, that the Writ was delivered to the Sheriff; sed non allocatur, for that shall be presumed until it appear to the contrary. ^{1 Sand. 29.}

(2.) This being an Outlawry at the Suit of the Defendant Cole, the Defendant ought to begin with the Outlawry in C. B. and to have set forth all the Proceedings, and not to begin first with the Process of Levam only.

Et per Holt Chief Justice, All Strangers who justify under Process of Execution (except Officers) ought to set forth the Judgment, and so must the Party who is Plaintiff, if he justifieth; but here 'tis only recited in the Writ, that the Outlawry was at the Suit of Cole, but not positively alledged so to be. ^{2 Vent. 91.}

(3.) Where the Defendants (the Officers) justify by the Command of the Sheriff to them, 'tis said per quod prædicti J. R. & Johannes, instead of Josephus, took the Catle, so not the same Man, and for this Mistake only, the Judgment was given against the Defendants.

Where by a Mistake of the Name of one of the Officers, the Judgment was reversed.

D E

Term. Paschæ.

Anno 10 Willielmi 3. B. R.

Silly *versus* Dally & al'. Intratur Hill. 9 Willi.
3. Rot. 747. and Judgment given Pasch.
10 Will. 3.

In all Bars,
Avowries
and Repli-
cations,
where a Ti-
tle is made
under a par-
ticular Es-
tate, the
Commence-
ment of that
Estate must
be set forth
in the Plead-
ing.

IN Replevin for taking his Cattle in a Place called the Newpark, in the Parish of St. Breock in the County of Cornwall.

The Defendants made Conusance as Bailiffs to John Tregeagle, Esq; for that long before the Taking, &c. scil't, 31 Julii ann. 1645. one John Tregeagle his Grandfather, possessionat' fuit de & in quodam messuagio & 44 Acris terræ cum pertinen' vocat' Trevanion Tenement' in prædicta parochia de St. Breock (unde the Locus in quo, &c. was Parcel) pro quodam termino Quingentorum annorum computand' a Tricesimo die Julii anno illo, &c. and being so possessed, he 31 Julii anno 1645. demised the same to John Carter, and to Richard Carter for the Term of 499 Years, and three Quarters of a Year, two Months, and three Weeks, rendyng a Rent of 16 l. per ann. and then they derived a Title to John Tregeagle the Grandson to the Reversion of this Term of 500 Years, as Executor to the Legatee of his Grandfather, and made Conusance for 52 l. Rent Arrear for three Years, and one Quarter of a Year, ended 1 Feb. 1696.

And upon a Demurrer to this Conusance, the single Point was upon the Pleading, (viz.) Whether the Defen-

dants, who derived only a particular Estate for Years to him in whose Right they made Conusance, ought to shew how that Estate commenced, by setting forth specially who had the general Estate in the Land, and who made this Lease of 500 Years to the Grandfather, so as the Plaintiff who was a Stranger, and for ought appears, a Purchaser, might have an Opportunity of traversing the Title of the Lessor, or of any other Person under whom he might claim; or whether this general Way of alledging a Possession of a Term for Years was sufficient in an Avowry, or in a Bar, where the Defendants are to make out a Title so as to justify the Taking another Man's Cattle.

Et per Curiam adjudged that this Conusance was ill, because the Commencement of the particular Estate was not set forth according to the general Rule in Pleading, (viz.) That in all Bars, Avowries and Replications where a Title is made under a particular Estate, be it for Years, for Life, or in Tail, the Commencement of such Estate must be shewn: for in those Parts of Pleading, none but the general Estate in Fee-simple (which may be gained by Wrong as by Disseisin) may be alledged generally.

But in a Declaration where 'tis only an Inducement to the Action, and not traversable, 'tis otherwise; as for Instance, where an Action of Debt for Rent was brought by an Executor for Rent grown due after the Death of the Testator who had only a Term for Years in the Land, 'tis sufficient to declare that the Testator being possessed for a certain Term for Years not yet expired, did Demise to the Defendant, &c. because this is grounded upon a Privy of Contract.

But in the principal Case, the Possession comes in by Way of Title, and in lieu of a Title, which the Plaintiff might traverse, for no Issue can or ever was taken upon a Possession only, (viz.) Possessionatus vel non, so that the Plaintiff by this Means will be deprived of all Opportunity to controvert the Title to the Land; for which Reason

Judgment was given for the Plaintiff.

Upon which a Writ of Error was brought in Parliament anno 2 Anna, and in Hill. Vacation that Judgment was affirmed, pro the Plaintiff Silly.

Curia.

1 Inst. 303. b.

March 1.

Cro. Car. 571.

Yel. 147, 148.

Cro. Car.

138.

2 H. 7. 1, 2.

2 Mod. 70.

See Antea

Sanders &c.

Huffay.

Butcher *versus* Andrews.

1 Salk 23.
Indebitatus as-
sumpsit will
not lie a-
gainst the
Father, at
whose Re-
quest the
Plaintiff lent
Money to
his Son.

Action on the Case on several Promises, one was for so much Money lent by the Plaintiff unto R. A. the Defendant's Son, at the Instance and Request of the Defendant.

Upon non assumpsit pleaded, there was a general Verdict for the Plaintiff, and entire Damages; and now it was moved in Arrest of Judgment, that a general Indebitatus assumpsit would not lie against the Defendant upon this Lending of Money unto his Son, for in respect to the Defendant 'tis a collateral Promise, upon which the Plaintiff ought to have declared specially, because upon the Lending to the Son, the Law cannot raise a Promise by the Father, but it will in the Son who borrowed the Money; and the Damages being entire made all naught, and the Court was of that Opinion.

Sed per Holt Chief Justice, If it had been an Indebitatus for so much Money paid by the Plaintiff at the Request of the Defendant unto his Son, it might have been good, for then it would be the Father's Debt, and not his Son's; but when the Money is lent to the Son, 'tis his proper Debt, and not the Father's.

The Judgment was arrested.

Atkinson *versus* Cornish.

3 Mod. 395.
Administra-
tor durante
minore etate
was Plaintiff,
to whom the
Administra-
tion was
granted as
Guardian to
the Infant;
this shall
continue till
the Infant is
of full Age.

THE Plaintiff declared as Administrator durante minore etate of T. S. and after some Pleadings there was a Demurrer, and Joinder in Demurrer; and now an Exception was taken to the Declaration, because the Plaintiff had not averred, that T. S. was still under Age of seventeen Years.

Sed per Holt Chief Justice, There is a Difference where Administration is granted to one as Guardian to an Infant, who hath a Right to administer, but is incapable to take it by Reason of his Minority, as in the principal Case, and where an Administration is granted during the Minority of an Infant Executor; for in the last Case the Administration determines as soon as the Executor attains the Age

of seventeen Years; but in the other Case it continues till the Infant attains his full Age, (viz.) twenty-one Years; and that the Law is so practised amongst the Civilians, wherefore

The Plaintiff had Judgment.

Burr versus Atwood.

Judgment in the Court at Maidstone in Kent, and upon a Scire facias against the Bail, Execution was awarded against them; and a Writ of Error was brought and prosecuted by Burr, who was one of the Bail for the Defendant in the original Action; and the Writ was, Tam in redditione judicii quam in adjudicatione Executionis against the Bail, &c.

1 Salk. 89.
Writ of Error by the Bail Tam in redditione judicii of the original Action, when the Bail are not entitled to such Writ.

And now it was moved to quash this Writ, because the Bail is not entitled by Law to a Writ of Error upon the Judgment, against the Principal in the original Action; to which the Court agreed.

And they quashed the Writ of Error Quoad all that related to the Judgment in the original Action, and no more; and the Writ was ruled to stand good Quoad the Judgment against the Bail upon the Sci. fa. and accordingly the Plaintiff Burr proceeded therein.

Dobertine versus Chancellour.

CASE, &c. to which the Defendant pleaded a frivolous Plea in Abatement; and upon a Demurrer to the Plea, there was Judgment against him to answer over.

Whereupon he pleaded Non Assumpsit, upon which they were at Issue, and the Plaintiff had a Verdict; and upon a Motion in Arrest of Judgment this Verdict was set aside, because in the Nisi prius Record there was no Entry made of the Plea in Abatement, and the Proceedings thereon, but only of the Plea Non Assumpsit, and all the rest omitted; and the Reason given was, because there was no Plea Roll to warrant the Nisi prius Roll; for upon the Plea Roll (which was in Court) between these Parties, it appeared, that such Proceedings and Judgment had been

5 Mod. 392.
In a Plea in Abatement there was Judgment to answer over, then the Defendant pleaded Non Assumpsit, and there was a Verdict and Judgment against him, which was set aside, because in the Record of

Nisi prius, there was no Mention made of the Plea in Abatement.

upon

upon a Plea in Abatement before the Plea of Non Assump-
sit, but the Nisi prius Roll mentioned no such Thing, there-
fore it could not be taken to be in the same Cause.

The King *versus* Maurice, Mayor of Lincoln.

5 Mod. 402.
Mandamus
to restore an
Apprentice
to his Free-
dom.

* 7 & 8 W. 3.
cap. 34.

Mandamus to the Mayor of Lincoln, to admit T. S. to his Freedom of that City, he having served an Apprenticeship there for seven Years, with a Citizen, who was a Mercer by Trade; this Writ suggested, that T. S. was a Quaker, and therefore could not in Conscience take the usual Oaths, &c. but that he had offered to do the same Thing by Way of solemn Affirmation, according to the new Statute, but that the Defendant refused to admit him.

The Return of this Mandamus was, that the Freedom demanded by the Quaker was a Place of Profit, for thereby he would have a Right to vote in chusing Members for Parliament, and also a Right to have Common of Pasture in the Wastes there.

† (viz.) That
no Quaker, by
Virtue of that
Act, shall be
qualified to
have any Of-
fice or Place of
Profit in the
Government.

† And this was intended to bring the Case within the Exception in the said Act of Parliament, so as the Quaker should be obliged to take the Oaths according to the Form of the Church of England, or otherwise be excluded from his Freedom.

Sed per Curiam, This is not a Place of Profit within the Meaning of the Exception; so the Quaker was afterwards admitted to his Freedom.

The Lady Caverly *versus* Sir John Leving.

Where the
Issue is local,
and not tried
in the right
Place, this is
cured by the
last Statute
of Jeofails.

THE Plaintiff demised a house to the Defendant, situate in the City of Chester, and the Defendant covenanted to repair, &c. and an Action of Covenant being brought for not Repairing, it was laid in the County of Chester at large, and the Visne at Tarvin; and upon Issue joined, the Cause was tried in the County, and the Plaintiff had a Verdict; and now it was moved in Arrest of Judgment, for that this Issue was local, and therefore it ought to have been tried in the County of the City of Chester.

Sed per Curiam, This is cured by the last Statute of Jeoffairs.

Judgment for the Plaintiff.

Wangford and Brandon Parishes in Suffolk,
moved in this Term, but not determined till
Michaelmas-Term following.

THE Case, If An Order was made by two Justices, which was confirmed by the Sessions upon an Appeal: And it was directed to the Constables of, &c. but not to the Church-wardens or Overseers of the Poor.

The Body of this Order was to remove three Men (naming them) with their Families, from the Parish of Brandon to the Parish of Wangford; and the Exceptions to this Order were as follow:

If (1.) That the Direction of this Order was ill, because it was to the Constables alone, who are not proper Officers for this Purpose.

Sed per Curiam, Since the Constables have executed the Order, 'tis well enough, tho' in Strictness they are not bound to obey it, tho' directed to them; for if a Justice directs a Warrant to any Person by Name, who is no Officer, the Person is not bound to obey it; but if he doth, and 'tis a Matter within the proper Jurisdiction of a Justice of Peace, the Warrant will bear him out, and he may justify under it.

(2.) This Order is void for the Incertainty of the Meaning and Extent of the Word Family, for Servants and Lodgers may be comprehended under that Word, whose Settlements are distinct from the Settlement of the Master of the Family, and are not to follow him as a Charge to the Place of his last Settlement.

But the Court was unwilling to quash the Order upon this Exception, until they were better informed of the Truth of the Fact; whereupon it was agreed on both Sides to produce Affidavits thereof, which was done, and the Fact was thus:

If. Three poor Men of Wangford came into the Parish of Brandon, and there married with three poor Widows of that Parish, who received Relief, &c. and each of the said Widows had Children by their former Husbands, some of

M m m

them

Warrant of removing a poor Man directed to the Constables, &c. without naming the Church-wardens or Overseers, yet good if executed by the Constable.

them (the Children) being under the Age of seven Years, and others above that Age; and this Order was not only to remove the three Men and their Wives, but also their Children, to the Parish of Wangford, as their last Place of Settlement.

Nurse children must follow their Mother, but others not.

Et per Holt Chief Justice, The Children are not removable into the Parish of Wangford, to charge that Parish by settling them there; but as to the Nurse-children under the Age of seven Years, they might be sent thither with their Mothers for Nurture, but still the Parish of Brandon must relieve them there, and not the Parish of Wangford; and as to the other Children above the Age of seven Years, they ought not to be removed at all, being settled Inhabitants in the Parish of Brandon, and the Removal of their Mothers shall have no Influence on the Settlement of their Children.

Therefore since the Justices had made an ill Use of this general Word Family; per Curiam, the Order was quashed.

The King versus Dean and Chapter of Norwich.

Mandamus to the Justices to sign a Poor-Rate.

MAndamus to the Dean and Chapter of Norwich, who were Justices of the Peace within the Precinct of the Close of the Cathedral Church of Norwich; and the Writ suggested, that the Overseers of the Poor within that Precinct, had made a Rate for the Relief of the Poor there, and that the Defendants refused to sign it and allow it; so they were commanded by the Writ to sign, allow, and confirm that Rate, or to shew Cause to the contrary.

The Dean and Chapter return, that the Rate made by the Overseers was partial, and they shewed several Instances of Partiality, as that A. rented a House there at 10 l. per Annum, and B. rented another House there at the same Rent, and yet A. was rated 7 s. and B. but 3 s. and farther, that they had signed and allowed another Rate, which was a Pound Rate, and an equal Rate, according to the yearly Rent of every House.

The Court doubted of this Return, and thereupon an Exception was taken to the Form of the Writ.

It was to command the Defendants to sign, allow, and confirm the Rate; whereas the * Statute requires only, that the Justices shall consent to it.

Adjournatur.

* 43 Eliz.

Nota, The Dispute was, Whether the Churchmen should be rated for their personal Estates there, or only according to the Rent of their Houses, and so pay no more than an Ordinary Tradesman. ^{1 Sid. 377.}

D E

Term. Sanct. Trin.

Anno 10 Willielmi 3. in B. R.

Iveson *versus* Moor & al'.

CASE, &c. wherein the Plaintiff declared, that he was possessed of a Colliery and Mine of Coals for a Term of Years yet to come, lying in the Bowels of such a Close within the Parish of Whitekirk in Yorkshire, prope adjacent to an Highway leading from such a Mill, and from thence in, by and thro' another Mill, & sic retrorsum, through which Way the Plaintiff upon all Occasions used to carry his Coals to the Neighbourhood for Sale; and averred that he had a great Quantity of Coals, (viz.) so many Hundred Loads which lay in his Close ready for Sale; and that the Defendant maliciously designing to deprive the Plaintiff of the Use and Benefit of his Coal-Mine, and to seduce his Customers to the Coal-Mine of the Defendant Moor, which lay near in the same Parish, they had (on such a Day) cast four Loads of great Stones, and the Root of a great Tree, in and upon the said Highway, in such a Part thereof, per quod the Way in that Place was so stopp'd up and obstructed,

^{1 Salk. 15.}
Whether an
Action on
the Case will
lie for stop-
ping an High-
way.

ed, that the Carts and Carriages of the Plaintiff could not pass to carry his Coals abroad, &c.

This Obstruction was laid with a Continuance for a Month, per quod the Plaintiff lost the Benefit of his Coal-Mine for all that Time, &c.

Upon Not guilty pleaded, the Plaintiff had a Verdict, and 40 l Damages; and now it was moved in Arrest of Judgment, that this Action (as it was laid) could not be maintained.

See Paine
ver. Par-
tridge, antea.

(1.) Because it appears by the Declaration, that this is a Publick Nuisance in an Highway, for which an Action on the Case is not maintainable, but it ought to be punished by Indictment, or may be removed at Pleasure, &c.

(2.) Admitting an Action will lie where a Man hath any particular Injury or Damage by a Thing which is a common Nuisance, as by falling into a Pit made cross a Highway; yet in this Case there are not Averments sufficient to bring it under that Rule, for 'tis not averred that the Plaintiff lost any particular Customer by Name, but only in general, that he lost the Profits of his Coal-Mine which is not sufficient.

Bro. Acc.
Case, plac-
to 1. & Nu-
sance plac-
to.

3 Cro. 664.
2 Cro. 446.
1 Inst. 56. a.
1 Roll. Abr.

Like an Action of the Case for Words, which are actionable merely because of Loss of Trade, or the Loss of Marriage; the Plaintiff must alledge the Names of the Customers, and of the Suits, otherwise it hath been always held that the Declaration is ill.

2 Bull. 276.
3 Bull. 75.
1 Cro. 140.
2 Rep. 79.
1 Roll. Abr.
56.
2 Sand. 115.

Moreover, to maintain this Action 'tis necessary, that the Injury and Damage done to the Plaintiff should be direct and positive, and not consequential only; and therefore it must be for some Hurt or Loss which the Plaintiff hath received in passing that Way, and not for any consequential Loss in being hindered to pass, for if he would, he might have removed the Nuisance.

The Chief Justice Holt and Rokesby were against the Action, for the Reasons supra, but Justice Turton and Gould were for the Action; and Justice Turton who tried the Cause, reported that the Way was stopped maliciously by the Defendant, and on Purpose to injure the Plaintiff; therefore the Action as laid is maintainable, and that it would hold upon a Demurrer to the Declaration.

That

That the Gift of this Action was the per quod the Plaintiff lost the Profits of his Colliery, because Carriages could not pass that Way; for which the Cases in the * Margn were cited, and they held that in the principal Case, the Certainty of the special † Damages need not be set forth; and that per quod he lost his Buyers, is good without naming them, because that would make a Polixity, as in Indiments for Barretty the Names are never inserted.

* 1 Roll.
Abr. 89.
Godb. 343.
1 Cro. 510.
1 Leon. 206.
Allen 22.
T. Jones 156.
1 Vent. 113.
† Hob. 284.
9 Rep. 53.

But the Chief Justice and Rokesby were of a contrary Opinion, & per Holt Chief Justice, if it had been laid that the Coals which the Plaintiff had ready for Sale, were spoiled or damaged, or lost, because he could not carry them off, in such Case, the Action had been maintainable.

The Court being divided, the case was adjourned before all the Judges.

Pullen versus Birkbeak.

THIS was a Motion to quash an Inquisition taken upon an Elegit, quoad the Extent of the Land only, for that it appeared upon the Return of this Inquisition, that the Sheriff had delivered Possession of more than a * Moiety.

Upon an Elegit, the Sheriff delivered more than a Moiety.
* Dyer 299.
1 Inst. 290.

2 Cro. 693. Townsend Judgments 129 Tit. Elegit. 1 Vent. 259. 1 Sid. 91. 239 Cro. Car. 162.

Et per Holt Chief Justice, If upon an Elegit, the Sheriff delivereth a Moiety of an House without Metes and Bounds, such Return is ill, and shall be quashed for Incertainty; but the Return in the principal Case is not void, but voidable by Writ of Error or Audita querela.

Theobald versus Long.

THE Defendant in this Action pleaded in Abatement another Action depending in this Court prior to the Action now brought; and now the Counsel for the Plaintiff craved Oyer of the Record of the Action thus pleaded, and moved for a Rule of Court, that unless the Defendant gave

Where a Record of the same Court is pleaded in Abatement.
1 Inst. 128.
Keilw. 95, 96.

gave Oyer of it the next Day, that Judgment final might be given against him.

Post. Cro-
mer *versus*
Wickett.

Et per Holt Chief Justice, Where a Record of the same Court is pleaded in Abatement, and the Plaintiff demands Oyer of that Record, and 'tis not given him in convenient Time, the Plea ought not to be received, but the Plaintiff may sign his Judgment; and the Rule was, that unless the Defendant gave Oyer of the Record the next Day, Judgment should be for the Plaintiff.

Roswell versus Prior.

2 Salk. 459.
Mod. Cases
116.
Case for
stopping his
Lights.

IN an Action on the Case, the Plaintiff declared, that on such a Day, and from thence to the Time of exhibiting his Bill, he had been possessed of such a House, in such a Parish in the County of Middlesex, in which House during the said Time there were such Windows, and for all that Time the Light de jure debet to come into his said House from those Windows, & inferri consuevit, and that the Defendant had built a new House so near the Plaintiff's House, that thereby his (the Plaintiff's) Windows were darkned, ad damnum, &c.

Bro. Hors.
de Son Fee
placito 1.
Fitz. Abr.
Brief placito
to 674.
Owen 109.
3 Cro. 335.
1 Roll. Rep.
13. 393.
9 Rep. 53.
8 Rep. 87.
Cro. Car. 575.
2 Cro. 43.

Upon Not guilty pleaded, the Plaintiff had a Verdict, and now it was moved in Arrest of Judgment, and insisted that this Case differs from all the Cases of the like Nature, which had been adjudged good only upon the *Mors* debet, as in the Cases for diverting a Watercourse, for stopping up Ways, for hindering a Commoner to enjoy his Common.

For in all these Cases some tortious Act was charged on the Defendants, but in this Case there can be no Tort, because 'tis lawful for the Defendant to build a House on his own Land, and therefore it was necessary that the Plaintiff should set forth in his Declaration, that his House was an ancient House, and that Time out of Mind, the Light came from his Windows, otherwise he is not entitled to this Action.

To which it was answered, That where an Action is brought against the Defendant as a wrong Doer, and nothing else appears upon the Face of the Declaration, there the *Mors* de jure debet are sufficient to maintain his Action.

Et per Curiam, This is good after a Verdict, because of the Words Inferri consuevit, for that implies a Prescription, and must have been proved at the Trial; but it would have been otherwise upon a Demurrer to the Declaration. Judgment for the Plaintiff.

Shaw's Case.

TWO Justices of the Peace for the County of Essex, adjudged Shaw to be the reputed father of a Bastard Child, and by their Order he was charged to maintain it, from which Order he appealed to the next Quarter-Sessions, after Notice, where, upon Debate, the Order of the two Justices was vacated.

And now it was moved to quash the Order of Sessions, for that it recited the Order of the two Justices, and Shaw's Appeal to the next General Quarter-Sessions, &c. whereas the * Statute which gives the Appeal directs, that it shall be to the next General Sessions, and probably there might be a General Sessions held for the County of Essex, between the Time of Notice of this Order and the General Quarter-Sessions when this Order was made; and if so, then this Appeal was irregular, and the Court of Quarter-Sessions had no Jurisdiction, for which Reason the Sessions-Order was quashed.

Order of Bastardy vacated at Sessions; the Appeal was to the next General Quarter-Sessions, when it should be to the next Quarter-Sessions.
* 18 Eliz. cap. 3.

Johnson *versus* Long. Intratur Trin. 10 Will. 3. Rot. .

IN an Action on the Case for a Nuisance, the Plaintiff declared, that on 21 April, Anno 8 Will. 3. and ever since, he was possessed of an antient Work-house, wherein Time out of Mind there had been a Window, and that the Defendant for all that Time was possessed of a Piece of Land adjoining; and on the same 21 April, quondam parietem super prædict. parcellam terræ ipsius (the Defendant) tam prope officinam prædict. de novo erexit & edificavit ita quod per eandem erectionem parietis, the aforesaid Window was darkened from the said 21 April, to the Exhibiting this Bill, per quod he lost the Benefit of the Light for all that Time.

The Defendant pleaded in Bar, that in Easter-Term, Anno 7 Will. 3. the Plaintiff impleaded the Defendant in an

1 Salk. 10.
Case for a Nuisance, the Defendant pleaded in Bar another Action depending for darkening the Lights.

an Action on the Case, in quo quidem placito, the said Plaintiff narrando versus eum tunc dixit quod cum, &c. reciting all the Declaration in hæc verba, which appeared to be the very same with the Declaration in the Action now depending verbatim, only with this Difference concerning Time, for that in this Declaration the Erection of the Nuisance was laid to be 21 April, Anno 8 Will. 3. and the Loss of the Light from thence to the Exhibiting the Bill, but in the former Declaration the Erection was laid to be 10 October, Anno 7 Will. 3. ita quod per eandem erectionem parietis the Window was darkned, and he lost his Light from thence to the 20th of April, Anno 8 Will. 3.

And the Defendant pleaded farther, Quod taliter superinde processum fuit quod postquam (the Defendant) placitasset ad inde non culpabilis & per quandam Juratam patriæ culpabilis invent. fuit postea scilicet the Plaintiff had Judgment against the Defendant to recover 14 l. for his Damages and Costs, and concluded his Plea, with an Averment, that the Work house, the Window, and the Erection of the Wall, in this, and that, the Action were all the same.

To this Plea the Plaintiff demurred, supposing, because of the different Times laid with Respect to the Loss of his Light, as well as to the Erection of the Wall, the former Recovery could be no Bar to this Action, because this was Damages subsequent to the Time of the first Action.

But it was adjudged for the Defendant, because the Plaintiff had not laid any Continuance of the Nuisance in his Declaration, and he shall not recover twice for one and the same Offence, but for the Continuance of the Nuisance he may have a new Action.

D E

Term. Sanct. Mich.

Anno 10 Willielmi 3. B. R.

The King *versus* Sir Richard Raines.

M Andamus to Sir Richard Raines, Judge of the Prerogative Court of Canterbury, commanding him to grant a Probate of the Will of Edith Pinfold, Widow, to one Watts, whom she had made Executor thereof.

1 Salk. 299.
Mandamus to grant a Probate of a Will to an Executor, because insolvent.

The Return was, that Watts absconded and was become insolvent; and that he had refused to give Caution to pay the Legacies given by the Will to some infant Relations, which amounted to above 500l. for which Reason he had denied to grant the Probate to him.

And now Dr. Waller came into Court to maintain this Return, who argued, that by the Civil and Ecclesiastical Law, the Judge in Cases of non solvendo was bound to take Caution for the good Administration of the Goods; and that what had been disputable in the like Cases was, Whether the Testator had any Notice of the Insolvency of his Executor, and also upon whom the Proof of that Matter should lie, (viz.) Either upon the Executor or those who oppose him.

For if the Testator had Notice of the Insolvency, and yet made or continued him Executor, in such Case no Caution could be required of him, tho' he was insolvent; but where the Testator had no Notice of the Insolvency, or if it happened after the Testator's Death, in such Case

N n n

Caution

Notes the case in L. Raym. 262. Mod. though the same in name is quite different in the facts from a different point of view. It is a point of a power given by a will to a person who is insolvent. It is a different case. The reason of their agreeing in name is that both cases are the same in name. In both cases, the executor was insolvent.

Caution is always required before any Probate shall be granted.

And if the Executor should refuse to give Caution, such a Refusal amounts to a Renunciation of the Executorship, and thereupon Letters of Administration cum Testamento annexo shall be granted, as was the constant Practice with Respect to Quakers, who were made Executors, (before the Statute made for their solemn Affirmation) and refused to take the usual Oath given to Executors upon Probate; such Refusal was taken as a Renunciation of the Executorship.

Linwood,
lib. 3. tit. 13.
de Testa-
mentis chap.
— Statutum,
&c.

See Selden
de Ecclesia-
sticis Juris-
dictionibus,
fol. 9.

But the other Side, against the Return, could get no Civilian to argue against their Jurisdiction; however, per Curiam, a peremptory Mandamus was granted, because since the Testatrix had thought fit to appoint Warts to be her Executor, without any previous Qualification, therefore the Judge before whom the Will is to be proved, ought not to interpose and demand Caution of the Executor, when the Testatrix required none.

And moreover, this Inconvenience would happen to all Creditors and Legatees, (viz.) Whilst this Matter is in Controversy, there will be neither Executor or Administrator against whom an Action may be brought to recover their Debts or Legacies; or if Administration should be granted upon such Refusal, and then the Administrator should bring on Action, it would be a good Plea, that there is a Will, and an Executor appointed.

Whereupon those who were concerned for the infant Legatees, exhibited a Bill in Chancery against Warts the Executor, and that Court enjoined him from intermeddling with the Affairs any farther than to satisfy the Legacy given to himself; for in Equity he is but a Trustee for the Infants; and where a Trustee is insolvent, the Court of Chancery will compel him to give Security before he shall enter upon the Trust.

Matthews *versus* Erbo.

ERBO who was a Foreign Merchant, and never in England, was outlawed at the Suit of Matthews in an Action on several Promises for Goods sold and delivered, and upon a special Capias Uelegatum, a Ship and other Effects belonging to Erbo were seized as forfeited upon this Outlawry.

A Foreigner was outlawed, and a Ship was taken upon a special Capias Uelegatum; now tho' the Person outlawed never was in England, the Court would not vacate the Outlawry.

And now it was moved, that this Outlawry might be vacated, and Restitution awarded, upon Affidavits produced and read, that the Defendant was never infra legem, (i. e.) That he never was in England; and therefore could not be outlawed, because that was putting him extra legem.

Sed per Curiam, This Outlawry shall not be vacated upon such Affidavits, but the Defendant may bring a Writ of Error, which he was compelled to do; and thereupon to put in Bail to the Action in which he was outlawed, according to the new Statute, and then the Plaintiff consented to the Reversal of the Outlawry.

Nota; This was a very good Project to get Bail from a Foreigner.

Jackson *versus* Piggot.

THE Case, N. One Dunkin drew a Bill of Exchange upon the Defendant Piggot dated 25 March Anno 1696. in which the Money was made payable on the 29th of April next ensuing.

Case against the Defendant upon the Acceptance of a Bill of Exchange.

This Bill was not presented to Piggot till after the said 29th Day of April, but yet he accepted the Bill, and upon this Acceptance this Action was brought, in which the Plaintiff declared, that on such a Day in the Year 1696. the Bill was presented at such a Place, and that the Defendant then and there accepted it, and promised to pay the Money secundum tenorem & effectum Billæ excambii prædictæ, which he had not done, &c.

Upon non assumpsit pleaded, the Plaintiff had a Verdict, and it was moved in Arrest of Judgment, that it was impossible for the Defendant to pay the Money secundum tenorem Billæ, because upon the Plaintiff's own Shewing the Bill was not presented or accepted until about a

Year after the Day when the Money was made payable by the Tenor of the Bill.

Sed per Curiam, The Acceptance of the Bill, though after the Day the Money was payable, is binding to the Defendant; and therefore this Action is maintainable; and as for these Words secundum tenorem & effectum Billæ, the Effect of the Bill is the Payment of the Money, and not the Day of Payment, or at the most this is but Surplusage.

The Plaintiff had Judgment.

Coot versus Lynch.

5 Mod. 421.
1 Salk. 321.
Ca. fa.
brought here
for Costs gi-
ven in Ire-
land is irre-
gular.

LYNCH brought an Ejectment in the Court of Common Pleas in Ireland as Lessee of the Lord Viscount Gormanstone against Colonel Coot, one of the Sons of the Earl of Montrath; and upon a Trial at Bar, Lynch had Judgment, upon which Coot brought a Writ of Error in B. R. in Ireland, where the Judgment was affirmed.

Then he brought a Writ of Error in the Court of King's Bench in England, where the Judgment of B. R. in Ireland was likewise affirmed; and lastly he brought a Writ of Error in the House of Lords here, upon which the last Judgment was also affirmed.

In each of the Courts in which these Writs of Error were brought, there were several and distinct Costs awarded to the Plaintiff in the original Action; and after the Judgment was affirmed in Parliament, Lynch brought a Capias ad satisfaciend' in B. R. here, as well for the Costs given by the Courts in Ireland, as for those given by the Courts here; upon which Writ Colonel Coot was taken in Execution here, and paid all the Money in order to obtain his Liberty.

4 Inst. 73.
3 Cro. 371.

And now it was moved for a Superfedeas, and to set aside this Execution as irregular and illegal, and to have Restitution of the Money he had paid, because no Execution could go out (in this Case) here, for all ought to be transmitted to the King's Bench in Ireland, with a mandatorij Writ, commanding that Court to award Execution.

But at least there was no Colour to have Execution here, for the Costs which were given in Ireland, whatever might be done concerning the Costs here.

On

On the other Side it was said, that an Action of Debt might be brought upon the Record which is here for the Costs of Suit, the Judgment being affirmed, and by the same Reason Execution may be sued. Yel. 118.
2 Cro. 512.

Sed per Curiam, This is irregular and illegal, for 'tis an original Ca. sa. which cannot issue into a Foreign County; but there must be a Testaturum Ca. sa. (after the first Writ) into the County where the Action was brought; and here 'tis not possible that there should be any such Thing.

Therefore it was superseded.

Hill *versus* Vaux.

IN a Prohibition, &c. the Suggestion was founded on a Custom in the Parish of, &c. that upon the ninth Day of May in the Evening, and on the tenth Day in the Morning, every Year, and from thence every 9th Night and tenth Morning, until a Lamb fallen in that Parish should be heard to bleat, they had used to pay all the Milk of their Cows to the Vicars, &c. at the Place where they were milked; and by Reason thereof were discharged of all Tithe-Milk for the Residue of the Year, and of any other Payment for the same. 2 Salk. 658.
Custom to
pay Tithe-
Milk void.

And now it was insisted against the Prohibition, that this was a void Custom, because it was a Modus of less than a tenth Part of the Thing it self in Specie, which is contrary to the Nature of a Modus, for that is something which is given in loco decimarum, and not Part of the Thing it self for Tithes, as in this Case Part of the Milk was to be paid as a Modus, in lieu of the whole Tithe for Milk.

(2.) It was argued, that this Custom was void for Incertainty, because there is no Place certain where this Tithe-Milk should be paid, but generally at the Place where the Cows are milked; so that 'tis in the Power of the Owner upon the tithing Rights and Mornings to separate his Cows, and to milk them in several Places, and there leave the Milk, which being to be paid in the same Evenings and Mornings it would be impossible for the Vicar to have so many Servants to attend at every milking Place to take the Milk; and by this Means he might be deprived of the Milk. Hob. 107,
175.
3 Bull. 326.
Raym. 277.

Be.

Besides, by the Law the Milk in Kind ought to be carried by the Proprietor either to the Parsonage House, or to the Church-Porch.

Curia.

The Court was of Opinion, that this Custom was void, for both the Reasons *supra*; and therefore a Prohibition was denied.

Yard versus Ellard.

1 Salk. 117.
Husband and
Wife need
not be join-
ed in the
Action.

CASE, &c. wherein the Plaintiff declared, That whereas the Defendant was indebted to him (the Plaintiff) and Elizabeth his Wife, Executrix of one Toller in 5 l. for Arrears of Rent due to her Testator in his Life-time, he (the Defendant) in Consideration the Plaintiff would give him Time for Payment of the Money until Michaelmas next following (which was about three Months), he would pay the Money; and the Plaintiff averred, that he had given the Defendant that Time, and that his (the Plaintiff's) Wife was still living, but that the Defendant had not paid the Money.

Upon non assumpsit pleaded, the Plaintiff had a Verdict, and now it was moved in Arrest of Judgment, that this Promise was void in Law; for if the Husband should recover upon it, such Recovery will be in his own Right, and the Damages will not be Assets of the Testator.

Besides, if this Promise hath any Effect in Law, the Wife who is Executrix, and upon whose Account the Husband is entitled to demand the Money, ought to have been joined in the Action.

Econtra.

To which it was answered, that this was a good Promise in Law, and grounded upon a good Consideration; for the Husband had the absolute Power of demanding the Money, and of prosecuting the Defendant to recover it; he had also full Power to release the Debt without the Consent of his Wife, and the Consideration of the Promise was a Benefit to the Defendant, and a Loss to the Plaintiff.

Moreover, the Damages recovered in this Action would in Law be accounted Assets of the Testator, because upon the Face of the Record it would appear, that the Action was founded upon a Debt due to him; or at least such a Recovery by the Husband alone would amount to a Devastavit in Law pro tanto, so as to charge both Husband and Wife in their own Right, and by that Means the Testator's Estate will not be diminished.

And

And as to the Objection, that the Wife ought to be joined in this Action, it was impossible so to do, because she was no Party to the Contract or Agreement between her Husband and the Defendant, and they would have been consulted if they had been joined in this Action, because a Promise made to the Husband alone, is not the same with a Promise made to the Husband and Wife; and the Case in the * Margin was cited as an Authority in Point for the Action.

* *Lea versus Mimme.*
Yelv. 84.

And the whole Court was of this Opinion, only per Holt Ch. Justice, the Recovery by the Husband would amount to a Devastavit pro tanto: Sed per Rokeby Justice, it would be direct Assets at Law.

Pool versus Gardner.

A Prohibition was granted Anno 9 Will. 3. to stay a Suit in the Consistory Court at Wells for Tithes Hay and Seed of Clover-Grass, upon a Suggestion of a Modus to pay 4d. per Acre for all Upland Meadows, which Modus was pleaded below, and Depositions taken there.

Modus must be proved within six Months, or a Consultation shall go.

And in Trinity-Term, Anno 10 Will. 3. this Court was moved for a Consultation, because the Plaintiff in the Prohibition had not proved this Modus within six Months; and thereupon a Consultation was awarded; and then the Spiritual Court proceeded to Sentence against Pool.

And now it was moved for a new Prohibition, because the Consultation was awarded for Default of proving the Modus in Time, and not upon the Merits of the Cause, so not within the * Statute of Ed. 3. by which 'tis enacted, that no Prohibition shall be allowed after Consultation duly granted, so as the Matter in the Libel is not charged.

3 Cro. 277,
736.
Yelv. 102.
Poph. 159.
* 50 Ed.
cap. 4.

And the Court was of this Opinion; whereupon a Prohibition was granted upon Payment of † double Costs, according to the † Statute, tho' it was strongly opposed, because after Sentence.

† 2 & 3 Ed. 6.
cap. 13.
par. 14.

Shoreditch Parish's Case, &c.

Where Part
of the Inha-
bitants ap-
peal from a
Poor-Rate,
the Sessions
may vacate
the Whole.

II. **T**HE Church-wardens and Overseers of the Poor of the Parish of Shoreditch, made a Rate towards maintaining their Poor, which was signed and allowed by two Justices of Peace.

And upon an Appeal of some of the Inhabitants to the Sessions, this Rate was vacated, because it appeared to be partially made, charging the Lands only, and omitting the personal Estates.

Afterwards the Church-wardens and Overseers, &c. made a new Rate, charging all real and personal Estates, from which several of the Inhabitants did likewise appeal to the Sessions, complaining, that tho' the personal Estates were named in the Rate, yet the Lands were charged with nine Parts in ten more in Proportion than the personal Estates.

And this being found to be true in fact, the Sessions vacated this second Rate, and ordered the Church-wardens to make a new and more equal Rate.

And now it was moved, that this last Sessions Order might be quashed, for that upon an Appeal of some of the Inhabitants only, the Sessions had no Authority to vacate the whole Rate, but only to relieve the Parties appealing.

* 43 Eliz.

Sed per Holt Chief Justice, 'Tis impossible to give Relief to every particular Person, because the whole Rate was illegal, and the Words of the * Statute concerning Appeals are very large.

That the Justices in Sessions have Authority upon an Appeal to vacate the whole Rate, if they find it to be illegal, and that in such Case they might have made a new Rate themselves, or they might have directed the Church-wardens to do it.

Wherefore the Order was confirmed.

Chedwick *versus* Hughes.

School-ma-
ster keeping
a School
without Li-
cense.

† 1 Jac. 1.
cap. 4 par. 9.

Prohibition to stay a Suit in the Ecclesiastical Court against a School-master for keeping a School without a Licence, pursuant to the † Statute, upon a Suggestion, that the said Statute gives a Penalty of 40 s. per Diem, against

against every such School-master, and that by Law nemo puniri debet bis pro uno & eodem delicto.

Et per Curiam, A Prohibition was granted, and so it was in the Case of Oldfeild *versus* Sir Richard Raines, upon the like Suggestion. See 1 Vent. 41. Bates's Case.

Nota, per Holt Chief Justice, At the Sittings in Westminster, 9 Novemb. 1698. in a Case of Perjury tried before him, between the King and Perkins, he said, that it was the Opinion of all the Judges of England, upon Debate between them. In capital Cases a Juror cannot be withdrawn.

(1.) That in capital Cases a Juror cannot be withdrawn, tho' all Parties consent to it.

(2.) That in criminal Cases, not capital, a Juror may be withdrawn, if both Parties consent, but not otherwise.

(3.) And that in all civil Causes, a Juror cannot be withdrawn, but by Consent of all Parties.

The King *versus* Galle.

A Information was brought by the Attorney General against the Defendant, founded on the Statute of * Ed. 6. for that he had sold Cattle alive in Norfolk, within the Space of five Weeks after he had bought them, by which he had forfeited double the Value of the Cattle. 1 Salk. 372. * 5 & 6 Ed. 6. cap. 14. Informations brought by the Attorney General upon any Penal Statutes, are void.

Upon Not guilty pleaded there was a Verdict against the Defendant; and now it was moved in Arrest of Judgment, that no such Information would lie in this Court, because the Statute * 21 Jac. expressly enacts, that all Informations brought by the Attorney General, upon any Penal Statute in any of the Courts at Westminster, shall be void and of no Effect. * 21 Jac. 1. cap. 4.

But on the other Side it was endeavoured to distinguish this Case from those Cases upon Statutes, which give Justices of Peace in their Sessions the ordinary Jurisdiction only; because this Statute of Ed. 6. gives the Sessions Power to proceed upon it, as well in a summary Way, by examining two Witnesses to the Fact (which is an extraordinary Jurisdiction) as well as by Trial by a Jury. Econtra.

And it was never intended by the Statute 21 Jac. to confine any Proceedings to inferior Courts, but in Cases only where the Trial of the Fact is directed by the Statutes to be by Jury in such Courts, because of the great

Entrenchment upon the Common Law, which allows no Trial but that of twelve Men on Oath.

But the Court, upon Reading both the Statutes, was of Opinion, that Since it was clear, the Defendant might have been prosecuted at the Sessions by Writ of Indictment upon this Statute of Ed. 6. therefore this Case was plainly within the Restraint of the Statute 21 Jac. and against the express Words thereof, it being an Information by the Attorney General.

That it hath been always ruled, this Statute 21 Jac. doth not give any new Jurisdiction to Justices of Peace, Justices of Oyer and Terminer, &c. where they had none before; and therefore it doth not extend to any Penal Laws, upon which the Prosecutions can only be in the Superior Courts at Westminster.

And upon this Reason are the Opinions founded in those Books, where it hath been held, that an Action of Debt upon a Penal Law will still lie in the Superior Courts, because no such Action can be commenced before the Court of Sessions, or before Justices of Nisi prius, or Oyer and Terminer.

The Information was quashed.

Hawkins *versus* Cardy.

1 Salk. 65.
A Note was
indorsed to
pay Part of
the Money,
not good.

THE Defendant had given a Note under his Hand to pay unto E. G. or Order, a certain Sum of Money, and E. G. by Indorsement on this Note, ordered Part of the Money to be paid to the Plaintiff; upon which this Action was brought; and a special Custom amongst Merchants was laid in the Declaration, according to the Plaintiff's Case.

And upon a Demurrer to this Declaration, it was adjudged per Curiam, that this is a void Custom, because by this Means the Defendant would be subject to as many Actions as the Person to whom the Note was given should think fit, and that upon a single Contract; wherefore the Plaintiff prayed Leave to amend upon Payment of Costs, to which the Defendant consented.

Harrison *versus* Cage & ux'.

Assumpsit, &c. against the Defendant and his Wife, upon a special Promise of the Woman before Marriage, which was, that in Consideration the Plaintiff Harrison being a Bachelor, had on such a Day and Place promised to take her (whilst sole) to Wife, she whilst she was sole, &c. promised the Plaintiff to take him for her Husband; then he averred in Fact, that he had tendered himself to marry her, and had requested her to marry him, but that she refused, and afterwards married the Defendant.

1 Salk. 24.
Assumpsit upon reciprocal Promises between a Man and Woman, to marry each other, and the Woman refused.

Upon non assumpsit pleaded, the Cause was tried at the Assizes in Norfolk, and there was a Verdict for the Plaintiff, and 400 l. Damages, the Woman being worth 3000 l. when the Plaintiff courted her, and afterwards by the Death of her Brother worth double that Sum.

And now it was moved in Arrest of Judgment,

(1.) Because this Action would not lie upon the Promise of Marriage made by the Woman, for the Law doth not intend, that the Man is advanced by Marriage, and therefore such a Promise of Marriage to him is of no Consideration in Law, and by Consequence no Action can be founded thereon.

But 'tis otherwise where a Man promiseth to marry a Woman, because in the Eye of the Law Marriage is an Advancement to the Woman.

(2.) This Promise is void for Incertainty, for there was no certain Time agreed on when the Marriage should take Effect.

To which it was answered and so resolved per Curiam, that here were reciprocal Promises; and therefore as her Promise to him was a good Consideration to make his Promise obligatory, so by the same Reason his Promise to her was a sufficient Consideration to make her Promise binding in this Case as well as in any other mutual Agreements.

1 Roll. Abr. 22. 77.
Hob. 10.
2 Bull. 276.
3 Bull. 48.
3 Cro. 323.
Carter Rep. Dickenson
or. Holcroft.

And the Court did not allow that Distinction between the Advancement of a Man and of a Woman in Marriage, and that this was a good Promise, tho' the certain Time of Marriage was not agreed on, especially since the Plaintiff averred, that he had offered to marry her, and that she

refused, which (in this Case) was necessary to be done to entitle the Plaintiff to this Action.

Nota; It had been moved before for a new Trial, because of the excessive Damages; but upon Reference to the Chief Baron Ward who tried the Cause, he certified that the Promise of the Woman was well proved, and that the Damages were more than he expected, but that he did not think them so excessive as to set aside the Verdict.

So the Plaintiff had his Judgment.

Goodwin versus Beakbean.

How many Days there ought to be between the Teste and Return of a *Sci. fa.*

Scire facias against an Administrator upon a Judgment obtained against the Intestate; this Writ was Teste 24 Octob. returnable die Lunæ prox' post mensem Michaelis, which was the 31 Day of October, and an Alias Scire facias was taken out Teste upon the Day of the Return of the first Writ, viz.) 31 Oct. which last Writ was returnable die Lunæ prox' post crastinum. annimatum, which was the 7th of November.

Upon two Nichils returned, Judgment was against the Defendant by Default; and thereupon the Intestate's Goods were taken in Execution by Virtue of a Fieri facias.

And now it was moved to set aside the said Judgment, and to have Restitution, because these Writs of Scire facias were irregular; for between the Teste of the first and the Return of the last, there were not fifteen Days exclusive of the very Days of the Teste and Return.

To which it was answered, that these Writs were as they ought to be, for there are eight Days inclusive between the Teste and Return of each Writ; and the second Writ must always bear Teste upon the same Day on which the first was returnable; and therefore of Necessity, that Day must be reckoned twice.

Besides, no Manner of Objection can be made to the Writs singly; therefore if each Writ is good as it stands alone, the putting them together shall not make them irregular by a joint Computation of the Time.

See T. Jones 228.

And the whole Court was of that Opinion; so the Plaintiff had Judgment.

Holland *versus* Serjeant.

A Declaration was delivered to the Defendant in Custody of the Sheriffs of London for Want of Bail according to the * Statute; and thereupon the Plaintiff proceeded and obtained Judgment against the Defendant being still in Custody of the Sheriffs.

1 Salk. 98.

* 4 & 5 Will. c. 21. If after Judgment a Prisoner is not charged in Execution within 2 Terms, he shall have a *Superfedeas*, &c.

And now it was moved for a *Superfedeas* to discharge him out of Prison upon filing common Bail, because two Terms were past since the Plaintiff had Judgment, and the Plaintiff had not in that Time charged him (the Defendant) in Execution; and his Counsel insisted, that since by this Statute, the Plaintiff is enabled to declare against the Defendant in Custody of the Sheriff, 'tis the same in Reason with the Practice before; where any Plaintiff declared against the Defendant in Custodia of the Marshal, if he had Judgment, and did not charge him in Execution within two Terms afterwards, the Defendant had a *Superfedeas* upon filing common Bail to the Action.

And the Court being of that Opinion, a Rule was made for a *Superfedeas*.

Nota; The Statute is, That in all Declarations against Prisoners by Virtute of any Process out of B. R. it shall be alledged in Custody of what Sheriff, Bailiff, &c. such Prisoner is, at the Time of the Declaration delivered; which Allegation shall be as effectual as if the Prisoner was in Custody of the Marshal, &c.

4 & 5 Will. cap. 21.

The King *versus* Albert Alverston.

BY an Order of two Justices, &c. of Middlesex, the Defendant being adjudged the reputed Father of a Bastard Child, was thereby charged to maintain it; which Order was special.

It recited that Mary Spence, the Wife of Jonathan Spence Mariner, was delivered of a Male Bastard Child, and that it appeared to them upon Oath of, &c. That Jonathan Spence her Husband was in the King's Service at Cadiz in Spain, and not within the King of England's Domi-

Order to charge a Man to be the Father of a Bastard begotten on a married Woman, but doth not say that her Husband was beyond Sea forty Weeks.

Dominions, at the Time when the said Child was begotten or born; which Order was confirmed upon an Appeal.

* 18 Eliz.
cap. 3.

And now it was moved to quash both the said Orders, because the Statute * 18 Eliz. concerning Bastard Children doth not extend to this Case, for the Justices have no Jurisdiction, but where the Child was born out of lawful Matrimony.

If this Woman had been delivered alone of a Child without crying out for Help, 'tis certain this would not have been Felony within the Statute 21 Jac. cap. 27. tho' no Proof could be made that the Child was born dead.

(2.) 'Tis impossible there should be a reputed Father when there is a known Father of whom the Law takes Notice; and tho' this Child may be a Bastard in Regard to any Right of Inheritance, yet that is not sufficient to bring it within the Comulance of the Justices of the Peace, by Virtue of this Statute.

(3.) The third Exception was to the Form of the Order, (viz.) for that it is not alledged therein, that the Husband was beyond Sea, for the Space of forty Weeks before the Birth of the Child, and 'tis not sufficient to say, that he was beyond Sea at the Time of the Conception, because that is what in Nature cannot certainly be known.

And for this last Reason only, these Orders were quashed; but the Court bound the Defendant by Recognisance to appear at the next Quarter Sessions for Middlesex, being inclinable to bring the Case within the Intent of the Statute 18 Eliz. because of the frequent Mischiefs of this Kind which have happened amongst Seamen's Wives.

Heylin *versus* Hastings.

225.

5 Mod. 425.
1 Salk. 29.
Where a
conditional
Promise shall
revive the
Debt, and
bring it out
of the Sta-
tute of Limi-
tations.

INdebitatus assumpsit by Heylin, Executor of one Read a Sadler, against Hastings, for Goods sold by the said Read to the Defendant.

The Defendant pleaded non assumpsit to the Testator infra sex Annos, and upon Evidence at the Trial before.

Holt

Holt Chief Justice. The Case was thus :

¶ The Plaintiff meeting with the Defendant Hastings, demanded so much Money of him for Saddles which he bought of the Testator more than six Years past, before that Time of their Meeting.

The Defendant denied that ever he had such Goods of the Testator, but promised that he would pay the Plaintiff for the Saddles, if he could prove that he (the Defendant) had them, which the Plaintiff fully proved at the Trial, and had a Verdict.

Whereupon a Case was made of this special Matter by Consent of both Parties, to be determined by the Opinion of the Chief Justice, and the Verdict was to follow the Success of that Determination; and now the Case was moved in Court, by the Direction of the Chief Justice, to hear the Opinion of the other Judges.

The Point in Law was, Whether this conditional Promise made upon the Denial of the Debt demanded, Would revive this Debt, now the Condition of the Promise was performed, (viz) by Proof of the Debt, so as to bring it out of the Statute of Limitations.

It was admitted by all, that if this conditional Promise did revive the Debt, tho' it was made to the Executor after the Death of the Testator, yet it was sufficient to maintain the Issue, (viz.) That the Testator Assumpsit, because the Promise did not give any new Cause of Action, but only revived the old Cause, and was of no other Use but to prevent the Bar by the Statute of Limitations.

Nota, That 2 Feb. 10 Will. 3. Anno 1698, All the Judges of England met at Serjeants Inn in Chancery-lane upon this Case; and they all agreed in Opinion, that this Promise, tho' conditional, (and since the Condition was performed) did revive the Debt and prevent the Bar by the Statute; and that a bare Acknowledgment of the Debt within six Years of the Action, is sufficient to revive it, and prevent the Statute, tho' no new Promise was made.

That this conditional Promise amounted to a Waiver of the Statute; and tho' no Promise was made, yet an Acknowledgment of the Debt is an Evidence of a new Promise.

So the Plaintiff had Judgment.

Lacy

Lacy *versus* Williams. Intratur Mich. 10 Will. 3.
B. R. Rot. 586.

a Salk. 568.
Common
Recovery
suffered by
the Tenant
in Tail, good.

ERROR of a Judgment in C. B. upon a special Verdict in Ejectment, in which the Case appeared to be as followeth:

J. William Lacy Esq; was Tenant in special Tail of the Lands in Somersetshire, being the Lands now in Question, (viz.) To him and the Heirs Males of his Body, upon the Body of Susan, his Wife, begotten, Remainder to himself and the Heirs Males of the Body of his Father, Remainder to his own right Heirs.

William Lacy had Issue by his Wife Susan, one Daughter named Sarah (the Lessor of the Plaintiff) and no more: And being thus seised, and intending to make Provision for the said Sarah, a Writ of Entry was brought in the Post, by George Keat, returnable in Michaelmas-Term, (viz.) In quindenam Sancti Martini, and this was against * Miles Corbett, who appeared as of that Term, and vouched to Warranty the said William Lacy, the Tenant in Tail; and thereupon a Summons ad Warrantizandum issued, returnable Octab. Hillarii following, which is the first Return of that Term, when William Lacy appeared by Warranty of Attorney, and vouched to Warranty the common Vouchee; and the Recovery was perfected and entered on Record in common Form.

* Who was
made Te-
nant to the
Præcipe by
Lease and
Release.

But it was found, that the Lease and Release which William Lacy made to Miles Corbett, to make him Tenant to the Freehold, was not executed till long after Michaelmas-Term, in which the Writ of Entry was brought against him, (viz.) about the Beginning of January next following.

So that the general Question was, Whether this was a good Recovery, or not, the Uses whereof were declared by the said William Lacy, to his Daughter Sarah, and her Heirs: And he afterwards died without any other Issue; and Lacy the Defendant in the original Action, and Plaintiff in the Writ of Error, was the next Brother to William Lacy, and claimed the Lands by Virtue of the old Entail, (viz.) as Heir Male of the Body of their Father.

The Objection insisted on against the Recovery was, that Miles Corbett who was made Tenant to the Præcipe, had nothing in the Lands at the Time of the Return of the Writ

Writ of Entry, and therefore the Recovery was of no Effect, otherwise than by Estoppel, or Conclusion to the Parties and Privies thereunto; but the Defendant was neither Party or Privy to it, for he claimed by a Title Paramount, and therefore as to him this Recovery was void.

And it was insisted, that the Writ of Entry did ipso facto abate, because the Tenant to that Writ had nothing in the Land; and to prove it, the Cases in the ** Margin* were cited.

17 H. 6. 19, 20. 3 H. 6. 34. 1 Roll. Abr. 865.

But it was agreed, that if once there had been a good Tenant to the Præcipe, his Alienation afterwards could not hurt; nor if he should suffer another Recovery against him upon a puisne Title, for that would be *†* fraudulent.

And in this Case the Voucher must likewise be void, because the Tenant, at the Time of the Voucher, had nothing to warrant; and a Voucher is in Lieu of an Action; and here the Tenant had no Cause of Action when he made the Voucher.

But it was adjudged in the Court of Common Pleas, that this was a good Recovery, because before the Return of the Summons ad Warrantizandum, the Vouchee came in, and the Tenant to the Writ was Tenant of the Freehold, and had a sufficient Estate to warrant, and upon which the Warrant did operate.

And this Judgment was now affirmed in B. R. per totam Curiam.

** 41 Ed. 3. 5.
1 H. 6. 1.
19 Ed. 4. 12.
18 Ed. 4.*

*† Brook
Brief, pl. 75,
77.*

*1 Inst. 102,
365.
9 Ed. 3. 12.
21 H. 6. 4,
49.
Hob. 21.*

D E

Term. Sanct. Hill.

10 Willielmi 3. B. R.

*Brown and Burton versus Franklyn, the King's
Proctor. In Scaccario.*

Prize or no
Prize is with-
in the Juris-
diction of the
Admiralty.

Prohibition to the Court of Admiralty, suggesting the Statute of Ric. 2. and that Pleas of Trespass on the Case for the Conversion of any Goods or Merchandise, as also the Trial of the Property of any Goods, &c. and the Cognisance thereof belongeth to the King and his Crown, and not to be tried before the Admiral, &c.

That nevertheless the Defendant being the King's Proctor, had libelled against the Plaintiffs in the Admiralty concerning the Property of a certain Ship called the Francis, and her Furniture, as also of 6000 Chequins of foreign Money, 200 Elephants Teeth, 300 Pieces of Muslin, 300 Pieces of Callico, &c. Ubi revera navis prædicta fuit Wrecca Maris in the East-Indies, out of the King's Dominions; ac ubi revera navis prædicta and her Loading, were not the Goods of the French King, or of any of his Subjects, Enemies to our King, but did belong to the Subjects of the King of Portugal, who is in Amity with us; ac ubi revera all the said foreign Money, and the Goods and Merchandise aforesaid, came to the Hands of the Plaintiffs super terram in the East-Indies, and there were by them sold, &c.

Upon opening this Case, the Fact appeared to be thus :

H. The Plaintiffs were Masters of two Ships belonging to the East-India Company, and being in a Port there they had Intelligence, that about the Island Joanna, there was a rich French Ship which might easily be surpris'd ; and accordingly they sail'd thither, and found the Ship whole, but stranded near the Shoar, and the Ship's Crew were at Land.

That the Plaintiffs landed their Men, and surpris'd the Enemy on Shore, and found the Chequins quilted in their Cloaths about their Bodies, and the Rest of the Goods were in the Ship where the Plaintiffs took it, and brought all away, but left the Ship behind being stranded.

The News whereof coming to England, it being in the Time of War between the English and the French ; the Defendant by Libel pursues for the King in the Court of Admiralty to have the Ship, Money and Goods condemn'd as lawful Prize, (as a Perquisite of the Admiralty) and accordingly after general Admonitions on the Exchange, as usual in such Cases, and no Person coming in to claim Property, there was a Sentence whereby all the said Things were condemn'd as lawful Prize.

And upon that Sentence this Libel was founded against the Plaintiffs, charging them that all came to their Hands, and that they had imbezil'd it, and converted the same to their own Use, and that they might account for the Value.

And now it was insisted for a Prohibition, that it was unreasonable the Plaintiffs should be concluded by the Sentence upon the general Libel to which they were not Parties, neither had they any Notice thereof ; for at that Time they were in the Indies ; and therefore it was mov'd, that the Plaintiffs might still have an Opportunity upon a Prohibition to try their Property, and to controvert their Right against the said Sentence, if Prize or not, and whether the Capture was at Land, or on the Sea.

And the Court inclin'd, that the Plaintiffs ought to have an Opportunity to be heard, and to controvert the Matter of Fact ; and thereupon a Day was appointed to hear a Civilian upon this Question.

H. Whether the Plaintiffs, upon this Libel depending against them in the Court of Admiralty, might controvert their Property there against the Tenor of the first Sentence.

And at another Day Dr. Lane acquainted the Court, that it was the constant Practice amongst them to admit of Appeals from such general Sentences for Prize, and that the Appellants were always let in to controvert their Right, and to disprove the Prize, notwithstanding the Sentence; because upon an Appeal their Method was to exhibit new Allegations, and thereupon to receive new and farther Proofs, so that the Cause was many Times another Thing before the Delegates than what it was at the Time of the first Sentence.

And it was then made appear to the Court, that the Plaintiffs had actually appealed from this Sentence of Condemnation for Prize, and so were in the proper Method to controvert their Right.

*See Antea,
King versus
Broom.*

Wherefore, and for that the Court apprehended (as it was insisted on the other Side) that Prize or no Prize was a Matter not triable at Common Law, but altogether appropriated to the Jurisdiction of the Admiralty,

The Prohibition was denied.

Machin versus Moulton.

*3 Mod. 450.
Libel in the
Consistory
Court at York
for Tithes of
Lands there,
when the
Defendant
lived in Lin-
coln.*

** 23 H. 8.
cap. 9.*

*Godb. 191.
2 Brownl. 12.
13 Rep.
Porter vers.
Rochester.
Hardres 421.*

Cro. Car. 97.

PROHIBITION to the Consistory Court at York, for that Moulton had libelled there against Machin, for Tithes of Lands lying within that Diocese, whereas he (Machin) lived at Lincoln within the Diocese of Lincoln, and out of the Diocese of York; and thereupon he suggested the Statute * 23 H. 8. which prohibits the Citing any Person out of his proper Diocese where he lives.

The Truth was, that the Plaintiff was accidentally at York, and was there cited by Surprize.

And now the Question was, Whether the Suit was local, and must necessarily be brought in the Diocese of York, because the Lands out of which the Tithes arise lie in that Diocese, or whether the Suit must follow the Person according to that Maxim in the Civil Law, *Forum sequitur reum*.

It was insisted for the Defendant, that this Suit is local, and could not be maintained out of the Diocese where the Lands lie; and therefore this Case is not within the Meaning of that Statute 23 H. 8.

The

The Definition of the Word Diocese is no other than Jurisdiction, and 'tis the Locality of the Lands which gives Jurisdiction, and the Owner being cited in the Diocese where the Lands lie is cited within the proper Jurisdiction, for 'tis his Lands which subject him to the Jurisdiction of the Consistory Court at York; * therefore if a Man lives in a Place where there is no Jurisdiction over the Cause (as the Plaintiff doth in this Case) he may and must be cited to the Place which hath Jurisdiction, otherwise there will be a Failure of Justice.

It was said, that when a Man hath Lands in one Diocese, and lives in another, he may be sued for the Tithes of those Lands in the Consistory Court of that Diocese where he lives.

Et per Curiam, This Suit is local; and therefore of Necessity the Plaintiff must be subject to a Citation out of the Diocese where he lives, or else the Defendant will be without Remedy for his Tithes.

A Prohibition was denied.

* 1 Levintz
96. in Point.

1 Roll. Rep.
329, 448.

2 Brownl.

121.
Winch. Ent.

57c.

2 Brownl.

27, 28.

D E

Term. Paschæ.

Anno 11 Willielmi 3. B. R.

The King *versus* Dr. Burnell.

* 25 Car. 2.
cap. 2.
Whether a
Censor of
the College
of Physicians
is an Officer,
and so bound
to take the
Oaths.
† 15 H. 8.
cap. 5.

INformation against the Defendant for not taking the Oaths pursuant to the Statute * 25 Car. 2. by which 'tis enacted, That all Persons admitted to any Office shall take the Oaths of Allegiance and Supremacy, &c.

In this Case a special Verdict was found, wherein the Patent granted to the Physicians in and about London, was set forth according to the Statute † 15 H. 8. and that the Defendant on such a Day was chose one of the Censors of the College of Physicians, and that he received the Sacrament the next Sunday after the Election, but that he had not taken the Oaths, as directed by the Statute 25 Car. 2. &c.

The Question was, Whether a Censor of this College was an Officer within the Meaning of the said Statute.

And it was argued that he was, for the Word Officium principally implies a Duty, and in the next Place the Charge of such Duty; and 'tis a Rule, that where one Man hath to do with another Man's Affairs against his Will, and without his Leave, that is an Office, and he who is in it is an Officer.

That the King hath the Care of the Persons of his Subjects, and consequently of their Health; and this is called *Munus officii nostri* in the King's Patent, found by the

the Jury, and by that Patent he hath delegated so much of his Office unto those Censors, which concerns the Physicians in and about London in general, and he is an Officer subordinate, who hath any Part of the King's publick Care delegated to him by the King.

Officers are distinguished into Civil and Military, according to the Nature of their several Trusts; and every Man is a publick Officer who hath any Duty concerning the Publick; and he is not the less a publick Officer where his Authority is confined to narrow Limits, because 'tis the Duty of his Office, and the Nature of that Duty, which makes him a publick Officer, and not the Extent of his Authority.

It was argued for the Doctor, that no Offices were within the Intent of the Statute 25 Car. 2. but such which related to the Revenue, or to the Conservation of the Peace, and that particular Powers created for particular Purposes were not within that Statute. Econtra.

That the Oversight and Inspection of Medicines is private in its Nature, and no more than the Care of a School-master, it being a Matter which concerneth a particular Science.

That he who is chosen Censor cannot refuse or avoid the Election, and his Power is with Respect to the Physicians and Apothecaries, and in that only about their Medicines, but not any Way touching their Morals.

It concerns their Skill and Art, and nothing else, and in this Respect is the same with a Trade; and in many Trades there are Inquisitors of the like Nature, and Powers given by several Acts of Parliament of punishing in Matters of Trade; as for Instance; in the Case of Barber-Surgeons and Goldsmiths; and yet these were never thought to be within this Statute.

And lastly, This is no Patent-Office; there is no Oath annexed to it, and the Censors have not so large an Authority as those excepted by the Act express.

Adjournatur.

London

London City *versus* Vanacker.

3 Mod. 438.
1 Salk. 142.
Custom to
amend old
By-Laws,
and to make
new.

THE Defendant was chosen one of the Sheriffs for the City of London, but refused, and thereupon an Action was brought against him in London, in the Mayor's Court, and in the Name of the Corporation, for the Fine of 500 l. according to a By-Law: And upon an Habeas Corpus all this Matter was returned into B. R. which Return consisting of several Customs and By-Laws in London, was very long; but the following Exceptions were taken to it.

(1.) For that a Custom is returned to amend old By-Laws when defective; and so by Virtue of that Custom this By-Law was made, 20 July, about sixty Years since.

The By-Law,
whether
good, or not.

Which By-Law is, that no Freeman chosen Sheriff, &c. shall be excused, unless he voluntarily swear he is not worth 10000 l. and bring six other Citizens to vouch in like Manner on their Oaths, that they believe it to be true; and if he openly refuse to take the Office, then to forfeit the Sum of 500 l. (viz.) 400 l. to the City, and 100 l. to the next Man who shall hold the Office.

T. Jones 145.

* Moor 563.
Godbolt 107.

Now this is not a proper Subject for a By-Law, because the Power of making By-Laws consisteth in the Corporation, and extends no farther than to what concerns the good thereof; but the Sheriffwick of London and Middlesex was a particular Franchise granted to the Citizens, &c. long after they were incorporated; and the Office of Sheriff of Middlesex is not within their Limits of Jurisdiction, therefore not within the Power of their By-Laws, which Power cannot extend beyond the Limits of the Corporation; and if the Sheriffwick of Middlesex is out of the Reach of this By-Law, and the Sheriffwick of London within it, yet the whole By-Law is void, because the Penalty is entire.

1 Rep. 77.
2 Vent. 183,
248.
Carter 121.

(2.) They have by this By-Law changed the Form and Manner of choosing Sheriffs, which by their Grant was to be by Citizens; but the By-Law gives the Election of one of them to the Mayor for the Time being.

(3.) This By-Law is unreasonable, for they have Liberty to chuse any Freeman qualified, and that without any Exception of Ideotism or old Age.

(4.) An Oath is imposed by this By-Law, whereas an Authority cannot be given by a By-Law to any Man to administer an Oath.

(5.) The Injunction to bring six other Citizens to vouch, on Oath, is still more extravagant, for 'tis impossible on another what they who made the By-Law have no Power to do: Besides, those Vouchers must be Citizens, who are entitled to Part of the Fine, (viz.) Part of the 400 l. for that goes to the Corporation, and they must be such as the Mayor and Aldermen shall approve, who are likewise Persons interested in the Fine, and therefore none of them proper Judges.

(6.) 'Tis not provided by this By-Law, that Notice shall be given of the Election to the Person elected; but the Forfeiture is to incur by Non-Acceptance of the Office within such a Time, tho' the Person chosen had never any Notice of the Election.

'Tis true, every Member of a Corporation is bound to take Notice of their By-Laws, but not of every collateral Fact which arises in Consequence of a By-Law, as in this Case, tho' the Defendant is to take Cognisance of this By-Law; yet there being one elected before him who had paid the Fine, the Time of a second Election is incertain, and depends upon the Pleasure of the Mayor and Aldermen, and therefore no Man can be bound to take Notice of it ex officio, or of what is done at that Time.

And in this Case the Mayor and Aldermen are to be Judges of the Reasonableness of the Excuse, and they are likewise to have the Fine; so that the Case is, those very Persons who are to have the Money as forfeited for not accepting this Office, are to be Judges, whether they will have the Money, or not: It was for that Reason, that in the Case between the Company of Stationers and Salisbury, their By-Law was held void, because the Company who was to have the Fine were Judges of the Forfeiture.

On the other Side it was said, that the Question is not, Whether this By-Law is reasonable or convenient for the Citizens, for if it doth not derogate from the Privilege, and is not directly against Reason, 'tis sufficient; because they who made the Law are proper Judges, whether 'tis for the Benefit of the City, or not; and 'tis not material if they impose new Laws on themselves, so they are not contrary to the general Laws of the Land.

Keilw. 116.
1 Roll. Abr.
443.

Dyer 240.
Allen 78.
March 163,
187.

Style 13, 124.

Cro. Car.
497.
2 Roll. Rep.
136. Jones
versus Tint-
ny.

1 Roll. Abr.
164.
March 179.
Sid. 115.

Econtra.

Grotius de
jure Belli.
Hob. 236.
3 Leon. 265.
Moor 73.
Raym. 446.

Every Law implies the Assent of all who are represented, and therefore they must be bound by it, and for that Reason every Freeman of London is bound by this Law.

'Tis true, no Man is compelled to be made free of the City, for that is voluntary and at his own Choice; but if he accept it, he must take it with the Conditions annexed to it, for by this Means he hath subjected himself to the Laws of the Place in Person, for this By-Law is personal, because it doth not concern the Office it self, but the Person who is to be the Officer.

As to the Objection, that the Sheriff of Middlesex is not within the Reach of this By-Law, because out of the Jurisdiction of the City; it was answered, that the Sheriff of London and Middlesex make but one Officer, and the Sheriff of Middlesex, was by the King's Grant annexed to the City.

Then as to the Objection, that an Oath cannot be imposed by a By-Law; admitting it to be true, 'tis not this Case, for the Oath is not imposed, but voluntary, the Words of the By-Law being, He shall not be excused unless he voluntarily swear he is not worth 10000 l. &c.

And as to the Objection, for Want of Notice, &c. 'tis impossible it should be given to every individual Citizen who is a Freeman, for they are bound by their Oath of Freedom to attend all these Assemblies; besides, if the Defendant was aggrieved for Want of Notice, he ought to have pleaded it in the Mayor's Court in his own Defence; and if Judgment had been given against him there, and he had found himself aggrieved by it, he might have a Writ of Error immediate before the Judges at St. Martins le grand.

34 H. 6. 41.
Reg. 131,
132.

Afterwards, (viz.) in Trinity-Term following:

Per Holt Chief Justice, who gave the Opinion of the Court, that this was a good By-Law for the Reasons given by him as followeth:

Hob. 111

1. That the making By-Laws is incident to every Corporation aggregate, for that Power is included in the Incorporation.

9 Rep. 61.
Clerk's Case.

That every By-Law, by which the Benefit of the Corporation is advanced, is a good By-Law for that very Reason, that being the true Touchstone of all By-Laws.

That the Charter of King John, by which the Sheriffwick of Middlesex was granted to the City, doth necessitate the making By-Laws concerning it, because they are bound by that Charter to nominate those Officers every Year, and cannot execute those Offices by themselves, or their Deputies; and therefore that Power must be included in the Constitution; and by the Acceptance of this Charter, every Member of the Corporation is bound to those Things which are incident thereunto, as in Benefit so likewise in Charge; as where a Common is granted to a Corporation, every Member takes some Benefit by it as incident to his Freedom.

And 'tis likewise a Thing necessary of common Right, that there should be a coercive Power in every Corporation to compel their own Members to submit to their Constitutions; and it will be a Forfeiture of that Charter, if the Office of Sheriff is not yearly supplied; and therefore to prevent this Mischiefe, 'tis of Necessity, that they should make By-Laws concerning it; and now the Sheriffwick of Middlesex being by the King's Grant annexed to the Corporation, it must be executed by the Members thereof, and so subject to their By-Laws.

3 Rep. in
Snelling's
Case.

An Administrator was held to be within the Custom of London, tho' the Commencement of Administrations was within Time of Memory, because it was within the general Reason of the Custom.

Litt. Rep.
94, 105, 124.

The Excuse which this By-Law gives, is for the Case of the Members of this Corporation; otherwise nothing but an insvincible Incapacity could have excused a Citizen who was elected Sheriff, as it was held in * Larwood's Case, and the six Compurgators are in Imitation and Nature of the like in a Wager of Law, so no new Thing.

3 Cro. 469.
Sid. 281.
* Antea.

As to the Objection, that Fools and Madmen are not excepted by this By-Law, those are tacitly excepted out of all Laws whatsoever; and therefore it would have been ridiculous to have made an express Exception of them.

As to the Objection, that the Excuse is referred wholly to the Mayor and Aldermen, 'tis true that it is so, but 'tis for the Case of the Party, because their Allowance will bind the whole City; but if they should refuse a reasonable Excuse, the Party is not bound by such Refusal, because he may give it in Evidence upon nil debet pleaded in an Action of Debt brought for the Forfeiture, and there the Validity of the Excuse will be tried by a Jury.

Q q q 2

And

And as for Want of Notice, every Citizen is bound to take Notice of the By-Laws of the Corporation, because they are virtually present by their Representatives; and the making every By-Law, and the choosing Sheriffs, is one of the most notorious Acts in the City of London, and done in the most publick Place.

As by the Statute Westm. 2. cap. 45. Proclamation of Outlawry being to be made in the County-Court, every Freeholder is supposed to be there, because there he ought to be; and therefore bound to take Notice of it.

See the Cases in the * Margin about By-Laws for these Offices.

* 24 Ed. 3.
19 H. 8.
30 H. 8.
6 Ed. 6.
13 Eliz.

Bishop of St. Davids *versus* Lucy.

Selling a Curacy, and taking Money for admitting Persons into Orders, is Simony.

DR. Watson, Bishop of St. Davids, was convened before his Provincial, the Archbishop of Canterbury, at Lambeth, to answer certain Articles exhibited against him before the Archbishop, at the Promotion of the Defendant Lucy.

By which Articles he was charged with Simony, and other high Misdemeanors in his Office of Bishop, and they were above thirty in Number; some of them were as followeth:

1. That the Bishop, in Consideration of 200 l. by him received, did covenant by Deed with one Brooks a Clergyman, to make him Curate of his (the Bishop's) Rectory of Borony-green in the Diocese of Ely, which he held in Commendam, and that he had privately given a Bond to the said Brooks to resign to him in some short Time.

(2.) Another of the Articles was for taking several Sums of Money from several Persons (naming them) to admit them into Orders, and for Collations and Institutions more than what was the customary Fees allowed; and it was alleged, that originally no Fee ought to be paid in such Cases; and this was also charged against him as * Simony.

* See Sparrow's Collection, Canon. 135.

(3.) Another of the Articles was, That the Bishop of that Diocese for the Time Being, was formerly made Visitor of a publick School of Charity, and that this Bishop had perverted the Charity to other Persons than directed by the Founder; and upon his Visitation had carried away all the Books which concerned the Charity, and the very Grant

Grant it self, by which it was given and governed now at his Pleasure.

(4.) That the Bishop had made Certificates under his Episcopal Seal, that several Persons who had Institution, had likewise taken the Oaths of Allegiance and Supremacy to qualify them, which was false in fact, and so had abused the authentical Seal.

See Otho's
Constitutions.
605.

(5.) That the Bishop had given compleat Ordination to one Owen who was but nineteen Years of Age, whereas he ought to be twenty-four Years old.

And now it was moved for a Prohibition; and as to the first and second Articles, admitting them to be true, the Bishop was only guilty of a Misdemeanor, for what is charged in those Articles is not Simony.

Keilw. 39.
2 H. 4. 10.
See Generale
consilium
357. and Ca-
non 810.

But it was objected, that the Archbishop had no Jurisdiction to convene before himself any Suffragan for a Misdemeanor.

Sed Curia of another Opinion, & per Holt Chief Justice, the Selling the Curacy, and taking Money to admit Men into Orders, is Simony, and punishable by the Metropolitan.

1 Roll. Abr.
Tit. Fees.
Davis Rep.
3. b.

And 'tis very plain, that all the Clergy are bound by the Canons confirmed only by the King, but they must be confirmed by the Parliament to bind the Laity.

And after many Debates a Prohibition was denied, but only quoad the Matter about the School, which was held to be merely Temporal.

And afterwards they proceeded at Lambeth against the Bishop upon the Rest of the Articles; and there a Sentence of Deposition passed against him, from which he appealed, and that Sentence was affirmed by the Delegates; and then Dr. Watson withdrew himself out of the Kingdom secretly.

Sir Joseph Tyly & al' *versus* Morrice.

THE Case, A. The Defendant was a Common Carrier from London to Exeter, and the Plaintiff by their Servant delivered to his (the Defendant's) Book-keeper 2 Bags of Money sealed up, and told him that it was 200 l. and desired a Receipt for the Money; thereupon the Book-keeper gave a Receipt for his Master to this Effect:

J. Re-

A Bag sealed up, was delivered to a Carrier, and said to contain 200 l. when there was 450, the Carrier was robbed, he shall be answerable only for 200 l.

ff. Received of, &c. two Bags of Money sealed up, said to contain 200 l. which I Promise to deliver on such a Day at Exeter unto T. Davis, he to pay 10 s. per Cent. for Carriage and Risque.

The Carrier was robbed of this and other Money on Hounslow-Heath in the Night-Time, but he paid 200 l. to Davis at Exeter.

And now an Action was brought against him in common Form, upon the Custom of England, wherein the Plaintiffs declared, that on such a Day and Place they had delivered unto the Defendant 450 l. to be carried from London to Exeter, &c. and at the Trial it was proved, that there was full 450 l. in Gold and Silver contained in those two Bags at the Time they were delivered to the Carrier for 200 l.

And the Question was, Whether the Carrier should answer for the whole Money; it was the Opinion of the Chief Justice, that he should answer for no more than 200 l. (which was acknowledged that he had paid to Davis) because in this Case there was a particular Undertaking by the Carrier for the Carriage of 200 l. only, and his Reward was to extend no farther than that Sum, and 'tis the Reward which makes the Carrier answerable; and since the Plaintiffs had taken this Course to defraud the Carrier of his Reward, they had thereby barred themselves of that Remedy which is founded only on the Reward.

So the Jury was directed to find for the Defendant.

The same Carrier was at the same Time robbed of six other Bags of Money, which the Book-keeper received sealed up, to be carried to Exeter, and there to be delivered to Mr. George Gould, which Bags were brought by the Servants of John and Joseph Fisher, and delivered to the Book-keeper for 300 l. who gave a Receipt for so much, when in Truth there was 400 l. in the said Bags; and the two Fishers and Gould who were Partners brought the like Action against the Carrier for 400 l. but had the like Verdict.

* Allen 93.

Nota; the Case of * Kenrigg and Egglestone was cited as an Authority for the Plaintiffs; sed non allocatur; for the Court held that Case different from the present Cases.

Lane *versus* Cotton & al'. Intratur Pas. 11
Will. 3. B. R. Rot. 403.

CASE against the Defendants Cotton and Franklin, the General Post-masters, setting forth the Statute a Car. by which the Post-Office was created, and that in Pursuance of that Statute a General Post-Office had been erected and settled in Lombard-street, London, and a Post established to carry Letters from London to Worcester, and from thence back again to London, and that the Defendants were constituted General Post-masters, by Patent from King William and Queen Mary, and that the Plaintiff was possessed of two Exchequer-Bills for 300 l. which he enclosed in a Letter directed to such a Person in Worcester, and that he delivered the said Letter with the Bills enclosed, unto the Defendants in their Office in Lombard-street; and that this Letter with the Bills was not conveyed to Worcester, but lost by the Negligence of the Defendants and their Servants.

The Pleadings.
2 Mod. 108.
5 Mod. 455.
1 Salk. 17, 143.
Action will not lie against the Post-master for a Letter miscarried in which there were Exchequer-Bills.
Sed Holt Ch. Justice *contra*.

And all this Matter being found specially, the Question was, Whether this Action would lie against the Defendants for this Neglect and Nonfeasance.

And it was argued for the Plaintiff, that this Action is maintainable, for the Post-masters are not appointed only as Officers to take Care of the King's Revenue, but as Officers in Pursuance of the Act of Parliament, to take Care of Letters, &c. so as to answer the End of the Statute, which is to advance Trade and Commerce for the Benefit of the Subject chiefly, and not as an Act for the Revenue, for that is but accidental.

For the Plaintiff.

And tho' these Officers were newly created when the Post-Office was first erected, yet they are under the same Conditions as Officers at Common Law, and therefore liable to an Action for Breach of Trust.

And a Nonfeasance is as good a Cause of Action against an Officer of Trust as a Misfeasance, (i. e.) for the Neglect of any Thing, which by the Duty of his Office he is obliged to do; as in the Cases against common Carriers, or for negligent keeping Fires, 'tis sufficient to declare in the Negative, (viz.) That the Defendant hath not done so, &c.

F. N. B. 93.
Fitz. Abr.
Proces 55.
Bro. Action
on the Case,
pl. 67.
21 Ed. 3. 43.
1 Roll. Rep.
63.

Moor 135. 1 Roll. Abr. 99. 12 Rep. 128. 1 Roll. Rep. 47.

That

That where an Act of Parliament appoints a certain Person to do such a Thing, and he neglects to perform it, by which Negligence another is damaged, he may have an Action on the Case to recompence him for the Damages.

And 'tis not sufficient to say, that the Defendants have not the Premium for Carriage of Letters; 'tis true, they have not the Whole, but they have a Salary which arises out of the Premium; and in that Respect 'tis like the Case of a Sheriff, who accounts for the Profits of his County, and yet stands liable to Actions for any Neglect of his Duty.

See Hardres
33.
Sid. 71.

And as to the Case of a Master of a Ship, where the Care of Provisions is in the Purser, yet the Master stands liable for the Default of the Purser; but here the Neglect was not in a Stranger, but in an Officer under the Defendants, for 'tis found that Brees, to whom the Letter was delivered, was placed in the Office by the Defendants; and they have Power by the Statute to remove Under-Officers, and to supply their Places; and the whole Office is entirely under the Control of the Defendants.

And it was insisted, that there was no Difference in Law between a Carrier of Letters and a Carrier of other Things, and that it was not material who had the Recompence, but that the Plaintiff having paid for the Carriage of his Letter, that gives him a Title to this Action.

* 1 Mod. 85.
1 Vent. 19.
Raym. 220.

And tho' it should be granted that this Office is virtually in the King (for he cannot have an Office actually) yet the Defendants are liable to this Action, as the Master of a Ship is liable, tho' another is the Owner; and for this Purpose the Case of * Morfe and Sluice was relied on.

As the Freight of a Ship is the Mother of Wages to the Sailors, so if the Freight is lost, the Wages are likewise lost; so here the Defendant's Salary comes out of the Profits of the Office, and if no Profits they can have no Salary; and they have their Salary as well in Consideration of their Hazard as of their Care in safe Carriage of Letters and Packets; and by their Care their Hazard is lessened.

Now if this Action should not lie against the Defendants, the Plaintiff would be without Remedy, for no Action will lie against Brees, who received the Letter at the Window, and threw it back into the Office at the Place appointed.

And 'tis plain, that the Statute 12 Car. 2. principally designed to make all People safe, by setting up certain Persons who should be responsible for the safe Delivery of Letters, and therefore it takes away the Liberty of sending them by any other hand.

The Hackney Coachmen are put under a Regulation by a late Act of Parliament, and they pay an annual Revenue to the Crown, yet still they remain liable for Goods delivered to them; and the Multitude of Under-Officers and Servants belonging to the Defendants is no Excuse to them for any Negligence, because they are obliged to answer for all of them: And though those Under-Officers give Security to the King, yet that doth not alter the Case, because they are Servants to the Defendants, and they may take other Security of them; for the Statute doth not give any Direction concerning that Matter.

And the Clause in the Defendant's Patent, that they shall not be answerable for their Under-Officers, makes no Alteration of the Law; 'tis true, 'tis a Royal Promise to indemnify them, and the Defendants know how to make use of it as such; 'tis like a Grant made to a Sheriff, that he should not be answerable for his Bailiffs, which would be a void Grant in respect to the Subjects.

Lastly, The very Acceptance of a publick Office is an Undertaking to perform it with Care and Diligence; and the Preamble of this Act shews, that there were Post-Offices before; therefore it cannot be supposed that this Statute, which was made for the Ease and Benefit of the Subject in respect to Commerce and Trade, should abolish those old Offices where the Officers were liable for any Negligence or Miscarriage of Letters, and erect new Offices where they should not be liable.

On the other Side it was argued for the Defendants, from the Nature of the Office, from the Smallness of the Premium, and from the Terms upon which the Office was granted to them. Econtra.

(1.) And first as to the Nature of this Office, 'tis so very extensive, both at Sea and Land, that 'tis not reasonable the chief Officers should answer for so great a Number of Under-Officers and Post-Boys who are worth nothing; and for a Miscalculation every Man is an-

R r r

swerable

swerable for himself; but for a Nonfeasance several Persons cannot be charged with an Action.

In the Cases of Carriers and Inn-keepers there is a general Undertaking, and they have it in their Power to secure themselves; but 'tis not so in this Case, for the Defendants have no Possibility to secure themselves against the Multitude of Servants which are of Necessity to execute this Office.

And the Under-Officers, tho' nominated by the Defendants, yet they are in under the King, to whom they are responsible and give Security.

(2.) The Rates for Postage are all fixed with Respect to the Bulk and Weight and Value; and are so small that it cannot be intended a Premium to warrant the safe Delivery of all Letters brought into the Office; for Jewels to the Value of 10000 l. may be sent in a Letter, the Carriage whereof may not amount to one Shilling; but the Case of a Carrier is different, for he may refuse the Carriage of Goods, unless paid in Proportion to their Value; but the Defendants cannot refuse any Letters, for they must take in all which are brought to the Office.

(3.) The Grant is such, that the Defendants have no Means to secure themselves against the Under-Officers, by taking Security, &c. because all is to be taken in the King's Name, which likewise differs this Case from that of a common Carrier.

Besides, here is no express Neglect found upon the Defendants, but only that the Letter was delivered to Brees, who was nominated by them.

Heretofore there was not any valuable Thing sent by Letter, and the Statute never intended that so great a Charge should be laid upon the Post-master.

Bills of Exchange differ from these Exchequer-Bills, because he who comes to the Possession of Exchequer-Bills, is thereby entitled to the Money, but Bills of Exchange must be indorsed; and it seems that the Carriage of Exchequer-Bills is not within the Duty of this Office, because the Statute by which it was erected mentions only the Carriage of Letters and Packets, and not a Word of the Carriage of Goods or Money; but as for these Matters any Man may send them by whom he will.

Now these Exchequer-Bills being established by Act of Parliament, are thereby made current Money for many Purposes; and therefore if they are sent enclosed in a Letter, he who sends them must make a special Contract with the Post-Master; for the Nature of them is such, that he who hath the Possession is entitled to the Money, so are as hazardous with respect to the Care of the Post-Master as ready Money.

'Tis Dispatch and Expedition which is required of the Post; and therefore 'tis necessary to ride by Night, when if robbed, there can be no Remedy against the Hundred, 'tis true as to the furnishing those with Horses who are willing to ride Post, 'tis such a Duty that probably an Action might lie against the Defendants for their Neglect in not providing them; but as to Letters they are only Directors.

As to the Case of a Master of a Ship, he is Master only of one Vessel, and he may be personally present therein, and he is upon his own Contract, and may agree for his Premium in Proportion to his Care and Hazard, which the Defendants cannot do.

Curia. But by the Opinion of three Judges, Judgment was given for the Defendants, against the Opinion of Holt Chief Justice, who held that the Action would lie.

Dr. Groenvelt *versus* Dr. Burnell, & al'. Intratur Pasch. vel Michaelis 9 Willi. 3. B. R. Rot. 178.

IN an Action of Assault and Battery, and false Imprisonment, brought against the Defendants who were Censors of the College of Physicians, and against Cole their Officer who served their Warrant, &c.

The Defendants plead as to the Battery & totum residuum transgressionis prædictæ præter the false Imprisonment Not guilty; and as to the Imprisonment they justify by Virtue of their Charter confirmed by Act of Parliament, and by the Statute 14 H. 8. by which they have Power to fine and imprison pro non bene utendo facultate medicinæ; then they set forth, that the Plaintiff at such a Time and Place had administered unwholesome Medicines to A. B. and so justify the Taking and Imprisoning pro mala praxi, &c.

Action against the Censors of the College of Physicians, who justify the Commitment *pro mala praxi*, good.

R r r 2

There

There was a Replication and Demurrer, but the Counsel for the Plaintiff did not insist upon the Replication, but only on the Plea, which as they argued was insufficient both in Form and Substance.

1 Roll. Rep.
176, 164.
1 Bull. 326.
1 Vent. 256.

(1.) In Form, because the Assault was not directly answered in the Body of the Plea.

* 8 Rep. 121.
1 Sand. 74.

(2.) In Substance, for that the Defendants have not set forth the particular and specifick Matters wherein the Mala praxis of the Plaintiff did consist, which ought to have been done, because 'tis a Matter which is traversable, as it was agreed in * Dr. Bonham's Case, this being an inferior Jurisdiction.

(3.) It was objected, that the Defendants had exceeded their Authority, because they had both fined and imprisoned the Plaintiff; whereas they had only Power to do one of those Things at their Election, but not both; and for this also Dr. Bonham's Case was cited.

(4.) The Defendants have not shewn that the Plaintiff was a licensed Physician, and if not licensed, they cannot censure him pro mala paxi, but ought to proceed against him for the Penalty of 5l. per Month upon the Statute for practising without a License.

*Contra for
the Defen-
dants.*

On the other Side it was argued for the Defendants upon these two Points.

(1.) Whether this Action would lie against them.

(2.) Whether the Plea was good or not.

As to the first Point it was insisted on, that this Action would not lie, because the Censors of the College of Physicians were in this Case as Judges, and what they had done was as such, and Judges are not to be sued for any Matters done by them unless ex malo animo, and there is no Difference between Judges who have a general Jurisdiction, and those who have a limited Jurisdiction in this respect, so long as those inferior Judges keep within their proper Bounds; therefore if they mistake the Law in a Matter within their Consuance and Jurisdiction, such Mistake shall no more subject them to an Action, than it will a superior Judge.

And the Reason is to prevent Multiplicity of Actions, which is the Cause why an Action will not lie against a Lord of a Manor, for not admitting a Man to his Copyhold; and as to that Matter the Cases in the * Margin were cited.

* 9 H. 6. 60.
Bro. Judges
placito 10.
12 H. 6. 3.
1 Leon.

123, 124, 189. Hutt. 12, 13. Bracon Excepcion, c. 15. Hardres Rep. Huntingdon *vers.* Terry.

(2.) As

(2.) As to the second Point it was argued, that the Plea was good both in Form and Substance.

Now the Objection as to the Form was, that there was no direct Answer to the Assault; and the Authority of the Case of * Wilson and Dodd was cited, which was an Action of Assault, Battery, Taking and false Imprisonment; the Defendant pleaded as to all præter the Assault, Taking and false Imprisonment, Not guilty, and as to the Taking and Imprisonment, he pleaded a special Plea, and said nothing as to the Assault; and upon a Demurrer to this Plea, Judgment was given against the Defendant, because he had not answered the whole Declaration.

* 1 Roll. Rep. 176.

'Tis true, the Authority of that Case was not denied, but it was said, that it was different from the present Case; for there the Defendant did not undertake any Way to answer the Assault; it was not answered under the Not guilty, neither was it taken in under the Præter, so that the Assault was totally excluded in that Plea; but here the Defendants in their Plea did, in the Commencement thereof, undertake to answer the Assault; for 'tis entered quoad totum residuum transgressionis prædictæ præter, &c. besides, in the Body of the Plea, they have expressly justified the Imprisonment which includes the Assault.

Next it was argued, that the Plea was good in Substance, for it was not necessary, or indeed reasonable, to set forth the Particulars of the Mala praxis, because the Defendants have a general Jurisdiction over all Physick within their Bounds; besides if such Particulars were set forth, this Court cannot judge of the Praxis, whether good or not, because 'tis a particular Science of which the Judges of the Common Law are not required to be conusant; and if every Drug should be set forth in the Plea, it would be perplexed with Multiplicity; and therefore a * general Pleading hath been always allowed.

* 20 H. 6.
31. b.
8 Rep. 121.
3 Cro. 916.

Besides, the Nature of the Thing is such, that none but Physicians can judge of it; for that which is good Physick for one Person may not be so for another, according to their different Constitutions, or according to certain Seasons of the Year; and therefore it would be very impertinent as well as prolix in this Case, to set forth the Person's Constitution to whom this Physick was administered by the Plainriff, or the Distemper or Season of the Year, as well as all the compound Drugs, &c. of the Physick administered.

After.

Afterwards in Trinity-Term, anno 12 Willi. Judgment was given for the Defendants.

* Per Holt
Ch. Justice,
as to that
Point in Dr.
Bonham's
Case, 'tis not
Law, but on-
ly an Opini-
on deliver-
ed, and not a
Resolution.

† 8 Rep. 38.
2 Inst. 308,
382, 208.
27 Assise
placito 18.

And per Holt Chief Justice, who delivered the Opinion of the Court, the Plea is good, because the Defendants have thereby sufficiently shewed their Authority over the Person of the Plaintiff, and they have shewed the Fact for which he was punished to be within their Jurisdiction as Censors, which Fact is not traversable in this collateral Action, because the Censors are made Judges to hear and determine; and therefore they are not liable to an Action for what they do by Virtue of their judicial Power; and he laid it down for a Ground, that wherever a Statute gives a Power to fine and imprison, the Persons to whom such Power is given are Judges of Record, and their Court is a Court of Record.

In Dr. Bonham's Case, they imprisoned him for practising Physick without a License, which they could not do, for in such Case they have no Power by the Statute to commit, but they ought to sue for the Penalty of Five Pounds per Month, qui tam, &c. but in this Case of mala praxis they have an undoubted Power to commit.

'Tis true, no Writ of Error will lie upon this Judgment, because 'tis a Court instituted de novo, and by the Institution they are not bound up to the Formalities of other Courts, (viz) they are not bound to draw up their Judgments with Ideo consideratum, &c. but 'tis sufficient for them to shew the Conviction in other Words.

And yet the Party thus convicted is not without Remedy, for he may remove this Conviction by the Censors into B. R. where it may be quashed for Insufficiency, and this may be done by Certiorari to any new constituted Court of Jurisdiction of Record, because B. R. hath a Power to keep all limited Jurisdiction within their proper Bounds.

But if the Plaintiff had not a Remedy in any other Court, it doth not follow from thence, that the Fact upon which this Conviction is grounded, should be traversable in a collateral Action, because the Power which the Censors have is given to them by Statute, by which they are (as it were) a Jury to try the Fact whether the Praxis is good or not; and if a Jury find contrary to Evidence, yet no Action lies against them, because they are on their Oaths; therefore what they find cannot be traversed.

And lastly, If the Mala praxis was traversable, yet this Plea is sufficient, because 'tis not necessary to set forth the Particulars of the Medicines, for this Court can make no Judgment, whether they were wholesome, or not; and the Defendants have alledged, that the Medicines administered by the Plaintiff were unwholesome.

And as to the Objection concerning the Assault, he said, that was included in the tot. residuum transgressionis, and answered by the Justification of the Taking and Imprisonment.

Judgment for the Defendants.

D E

Term. Sanct. Trin.

Anno 11 Willielmi 3. in B. R.

The King *versus* Harris.

1 Salk. 260.
Where a
Man is
found guilty
of a forcible
Entry, Re-
stitution must
be awarded
forthwith.

HARRIS was found guilty of a forcible Entry upon an Inquisition taken before Justices of the Peace, according to the Statute 8 H. 6. but no Restitution was awarded upon this Conviction, nor any Thing farther done for three Years now past.

In which Time Harris brought an Action about the same Matter, and had a Verdict, and still continued in Possession after the Conviction, to this Time: And now after three Years, and after the Proceedings, as aforesaid, the Justices coram quibus, &c. awarded Restitution upon the said Conviction, and Harris was put out of Possession.

Thereupon he procured the Conviction, &c. to be removed into B. R. by Certiorari, and several Objections were made to the Form of it, but they were all overruled; and then it was insisted on, that this Award of Restitution, so long after the Conviction, was illegal and void; for that a present Remedy was intended by the Statute, therefore the Restitution ought to follow the Conviction in convenient Time.

* 8 H. 6.

So upon the Statute 15 Richard 3. if a Man is convicted of a forcible Entry or Detainer, upon View of a Justice of Peace, he ought to commit the Person forthwith, or not at all; for if so long a Delay should be allowed as three Years, no Purchaser could be safe in his Possession, who had purchased the Lands bona fide, between the Conviction and the Restitution; and the whole Court being of that Opinion,

Restitution of the Possession was awarded to Harris.

S f f D E

D E

Term. Sanct. Mich.

Anno 11 Willielmi 3. B. R.

Plisse *versus* Smith. Die Veneris 10 Novemb.
1699.

To say of a
Widow, she
was never
married, is
a Spiritual
Defamation.

A Rule was obtained to shew Cause why a Prohibition should not go to the Ecclesiastical Court to stay a Suit there by Smith, a Widow, against Plisse, for these Words:

ff. She was never married, and never had a Husband, (and what is her hopeful Son) innuendo, that she was a Whore.

And upon Debate the Rule was discharged, for the Court was clear in Opinion, that these Words were a Spiritual Defamation.

Harpur *versus* Davy.

Where a
new Trial
was granted.

ASSUMPSIT, &c. upon Non Assumpsit pleaded, the Plaintiff had a Verdict, and afterwards, upon a Motion, the Defendant obtained a Rule for a new Trial upon Payment of Costs, and bringing the Damages into Court which were found in the former Trial; which was
done

done accordingly, and the Rule was to try the same Issue, &c.

Now the Plea-Roll of that Action was of Easter-Term Anno 11. and by the Memorandum it appeared, that the Bill was exhibited in Hillary-Term before; and upon the Rule for a new Trial, the Plaintiff did not proceed upon the same Roll, but made up a new Plea-Roll as of this present Michaelmas-Term, and a Memorandum of a Bill exhibited in Trinity-Term last past; and hereupon a Trial was had, and the Plaintiff had another Verdict, but upon a Motion it was set aside for Irregularity, because this was another Cause, as it now appeared to be, and the Plaintiff had not pursued the Rule of Court for a new Trial, which was to try the same Issue which was tried before in the first Action.

And in this Case, that between *Dubartine and Chancellor was cited, which was an Action of Trespass, Quare uxorem abduxit cum bonis viri, &c. * 5 Mod. 392.

The Defendant pleaded in Abatement only for Delay; and upon a Demurrer to the Plea there was Judgment, that the Defendant should answer over; whereupon he pleaded the general Issue, and there was a Verdict against him, but it was set aside for Irregularity, because in the Record of nisi prius, the Plaintiff had omitted all the Proceedings on the Plea in Abatement, and made it up as if there had been no such Plea, but only the general Issue.

The Case of Abingdon Town.

A Mandamus was directed to the Mayor, Bailiffs, and all the capital Burgesses (except John Selwood and John Spinage) setting forth that by their Charter at such a certain Day, the Commonalty are yearly to choose two out of the capital Burgesses, and to present them to the Mayor, Bailiffs and the Rest of the capital Burgesses, and they are to elect one of those two thus presented, &c. to be Mayor of the Town for the Year ensuing.

That Selwood and Spinage being two of the capital Burgesses, were elected and presented by the Commonalty, and that the Mayor, Bailiffs and the Rest of the capital Burgesses refused to proceed to the Election of a Mayor

² Salk. 431,

432.

The Court cannot refuse the Return of a Mandamus by a Mayor, because he is the principal Officer to whom 'tis directed.

Mayor out of those two for the next Year; and the Writ was to command them to go to the Election of a Mayor out of those two Persons thus presented.

This Writ being delivered to the Mayor in Possession, he upon the Receipt thereof summoned the Bailiffs and capital Burgesses to an Assembly, who appearing upon the Summons, the Majority of them were for making a new Election of a Mayor according to the Command of the Writ.

But the Mayor in Possession (being of another Party) disagreed to it, and forthwith dismissed the Assembly; and afterwards he made this Return to the Writ, (viz.) That those two Persons presented to him in Order to choose one of them for Mayor, &c. were not qualified for that Office, not having received the Sacrament in due Time according to the Corporation Act made, Anno Car. 2.

And now the Court was moved in Behalf of the Majority of the Bailiffs and Burgesses, &c. to stay the Filing this Return, because made against the Votes of the Majority of those unto whom the Writ was directed; and that the Mayor might shew Cause why an Attachment should not go against him for this Practice, and accordingly a Rule was made for him to shew Cause, &c. upon the whole Matter.

And afterwards it was debated several Times upon this single Point, whether the Return offered by the Mayor might be stayed, or whether the Court were bound to receive it, notwithstanding the Practice as aforesaid, and at last the Court came to the following Resolution.

ff. That they could not refuse the Mayor's Return, because he is the principal Officer to whom the Writ was directed, and to whom the Writ was actually delivered, and all that the Court could do was to compel a Return to be made to the Writ.

And if the Mayor had made any Return contrary to the Votes of the Majority concerned, it was at his Peril, and that the Way to punish him was by Information in B. R. and therefore the Rule supra was discharged, and the Mayor's Return was filed; but upon Debate it was held to be no good Return.

Where.

Whereupon in Easter-Term, 12 Willi. the Counsel for the Mayor took an Exception against this Writ of Mandamus which was, that it was ill directed, because it was not to the whole Body politick by its corporate Name, nor to any Persons natural by their proper Names, but to the Mayor, Bailiffs, and all the * capital Burgeses except two; and Sir Thomas Holt's Case on a Mandamus was cited, which was to the same Town, but quashed for this very Reason. T. Jones 52.

* *Nota*, They were incorporated by the Name of Mayor, Bailiffs, and Burgeses, and not capital Burgeses.

But this Court denied that Case to be Law, so that it was most proper the Writ should be directed only to those who are bound to obey it; wherefore a peremptory Mandamus was granted.

The King *versus* Chandler.

THE Defendant being convicted upon the † Statute for killing Deer in the King's Chase called Enfield-Chase, this Conviction was removed by Certiorari into B. R. and the following Exceptions were taken to it.

† 3 & 4 Will. cap. 10.
1 Salk. 378.
5 Mod. 446.
Several Exceptions taken to a Conviction for Deer-stealing.

(1.) For that the Fact was not laid to be done upon any certain Day, but generally that the Defendant did between such Days hunt and kill so many Deer, where as he ought to set forth the certain Day.

(2.) It was laid to be done without the Consent of the King proprietor damarum, &c. but did not say tunc proprietor so as to fix it at the Time of killing the Deer.

(3.) It was laid to be done without the Authority of any Person entrusted with the Keeping the Deer at the Time when they were killed; whereas 'tis possible that the Defendant might have Authority from some Person entrusted with the Keeping, &c. at that Time when the Authority was given, but not be entrusted, &c. at the Time of the Killing; and if so, the Defendant is excusable, unless he had Notice when the Trust was determined.

(4.) It doth not appear, that any Summons was awarded against the Defendant, or that he was brought in by any lawful Process.

(5.) The Judgment is informal, being short of what is required by the Statute; for here is no conditional Judgment of setting the Defendant on the Pillory, &c.

But

* 1 And.
138. Cuffe's
Case.

But as to this Matter it was answered, that this conditional Part ought not to be added, and for that the Case in the * Margin was cited, which was upon the Statute 23 Eliz. cap. 1. as a Case in Point.

(6.) It did not appear that the Justices of Peace coram Quibus, &c. did give Judgment upon Evidence of Witnesses, or upon Confession of the Party, for 'tis Quia visis, &c. omnibus præmissis, &c. constat to the Justices, that the Defendant est culpabilis; so for any Thing appearing to the contrary, it may be partly upon Evidence, and partly upon Confession; which ought not to be.

The King
ver. Speed.
1 Salk. 379.

And in some short Time afterwards another Conviction was returned upon one Speed for killing one Deer in the same Chase, and the same Counsel took Exceptions to this Conviction.

(1.) For that it was too generally laid in the Circumstance of Killing, for it was only laid unam damam, Anglice a Fallow Deer, not saying whether Buck, Doe, or Fawn, and 'tis quod illicite occidit, without shewing how, (viz.) whether by Gun, Arrow, Net, &c.

(2.) It did not appear that the Witness gave Evidence Face to Face, so as the Defendant might have an Opportunity to cross-examine him.

(3.) The Fact is laid to be done sine consensu proprietar', &c. without saying vel alicujus eorum.

(4.) 'Tis said, that the Defendant was convicted upon the Evidence of such a One, credibilis testis, in ea parte, when it should be in hac parte.

(5.) The Fact is not laid to be done contra pacem Regis; which ought to be in all Convictions upon forcible Entries before Justices of Peace.

Nota; These Convictions depended till Trinity-Term, Anno 12 Will. and then they were both affirmed.

The Objection which seemed to be of most Weight, was the first, which was made in Chandler's Case, (viz.) That the Fact was not laid to be done on any certain Day, &c. to which it was answered, that all Informations in the Exchequer were in this Form; and several Precedents were cited in this Point, which may be seen in the † Margin.

† Raft. Ent.

415.
Hern's Pleader 349, 307, 308. Winch. Ent. 341, 347. Thompson Ent. 91. Brown formula placitandi 30, 251, 260, 250, 252. Vidien Ent. 186. Coke Ent. 158.

And it was held per Curiam, that the Manner of the Killing need not be shewn specially, and that it was not necessary to lay it to be contra pacem; and that there needs no formal Judgment upon this Conviction, with an Ideo consideratum est, but that 'tis sufficient to say, Ideo convictus est, or Ideo forisfaciet, &c.

Nota; These were the first Cases of Controversy upon any Conviction on the last Statute against Deer-stealing. See postea the same Case 508.

The King versus The Town of Hertford.

UPON a Motion Leave was given to file an Information in Nature of a Quo Warranto against the Corporation of Hertford, for assuming a Right to make Freemen of Foreigners to the Town and Corporation.

Information shall not be filed in the Crown-Office before the Informer gives Security to answer the Costs, if the Defendant is acquitted.

The first Process out of the Crown-Office was a Venire facias in Nature of a Summons, which was made returnable in Easter-Term, Anno 11 Will. 3. upon which a Distringas issued, returnable Cro. Trin. and upon that Return a second Distringas was made returnable in fifteen Days in the same Trinity-Term, and upon the Return thereof a third Distringas was made Teste in that Term, and returnable in this present Michaelmas-Term, Anno 11 Will. 3.

And now it was moved in Behalf of the Corporation, that these two last Distringas's might be discharged for Irregularity, for that the Process in these Cases are to be returnable de Termino in Terminum, and not quicker; but that in Trinity-Term there issued two Distringas's, which ought not to be.

This Matter being referred to Sir Sam. Astley, the Master of the Crown-Office, he reported that the Proceedings were regular, and that no more than fifteen Days is required to be between the Teste and Return of these Process's; but it was still insisted for the Corporation, that there were above forty Precedents in the Office in such Informations against Corporations, where all the Process was made de Termino in Terminum.

But Holt Chief Justice answered, That Crown Office work was like Church-work, very slow in its Progress, it being usual for the Clerks to make all such Process out together, and of the same Teste and Return from Term to Term; but no Law requires that it should be so.

Where

Wherefore the Prosecutors moved for a special Rule to direct the Issues upon these Process's, but no such Rule was made, but the Issues were left to be directed in due Time, according to the Course of the Court.

4 & 5 Will. 3.
cap. 18.

And in Easter-Term following, Anno 12 Will. 3. it was moved again for the Corporation to quash all the Process that had been against them, because the Informer had not given Security in the Crown-Office for the Costs in Case of Acquittal of the Defendants, according to the Statute Anno 4 & 5 Will. 3. By which 'tis enacted, that the Clerk of the Crown-Office shall not receive or file any Information for Trespas, or other Misdemeanor, or issue any Process thereon, before he shall have taken, &c. a Recognizance from the Informer in the Penalty of 20*l.* to prosecute with Effect; and that if the Defendant shall appear and plead to Issue, and upon a Trial the Defendant shall have a Verdict, the Court shall award him Costs, &c.

But it was insisted, that Informations in Nature of a Quo Warranto (as this was) were not within that Statute, for that extended only to Informations for Trespas, &c.

Sed per Curiam, Every Information, which in its Nature may be veracious, is within the Purview of that Statute, and for that Reason Security ought to have been given before any Process had issued; and so all the Process in this Case was quashed by Rule of Court.

Alanson *versus* Brookbank.

Prohibition
denied where
the Plaintiff
was cited on
a Sunday.

THE Plaintiff moved for a Prohibition to the Court of Durham, because he was cited by their Process on a Sunday, in a Cause of Incontinency with the Earl of Arg. who had deserted his Wife, and lived with the Plaintiff in Adultery.

* 29 Car. 2.
cap. 7.

The Suggestion for this Prohibition was founded on the * Statute 29 Car. 2. by which 'tis enacted, that no Person on the Lord's Day shall serve any Process (except in Cases of Treason, Felony, or Breach of the Peace) but such Service shall be void, &c.

Now it appeared by the Return of the Apparitor upon the Citation, that he served it on a Sunday; the Court ad-
journed

journed this Matter till the last Day of this Term, and then the Prohibition was denied.

The Bishop of Salisbury & al' versus Phillips.
Intratur Mich. 11 Will. 3. B. R. Rot. 377.

Quare Impedit brought by Phillips against the Bishop of Salisbury and Berrow, for hindering him to present, &c. to the Church of Stanton Fitzwarren in the County of Wilts.

1 Salk. 43.
Where Joint-tenants of an Advowson made Partition by a Deed of Covenant between themselves.

After some special Pleadings in the Court of Common Pleas, where this Action was brought, there was a Verdict and Judgment against the Bishop, and thereupon he brought a Writ of Error in B. R. The Title in the Declaration was thus laid:

¶ That John and Richard Organ were seised in Fee of the Advowson in gross, and being thus jointly seised, they by Indenture dated 26 Junii, Anno 13 Jac. and made between themselves concluserunt & agreaverunt inter se, that from thenceforth they would be seised in Common, and not jointly of the said Advowson of this Church, (viz.) That the said Richard Organ should stand and be seised, and have and enjoy one Moiety of the said Advowson to him and his Heirs; and that the said John Organ should stand and be seised, and have and enjoy the other Moiety, &c. to him and his Heirs, and that they and their several Heirs, as often as the said Church should become vacant, should severally present by their several Turns, alternis vicibus modo & forma sequen. (viz.) That Richard Organ and his Heirs should present for the first Turn, and John Organ and his Heirs for the second Turn, and so alternis vicibus as often as the Church should become vacant.

That afterwards Richard Organ presented in his Turn one John Woodbridge, and after the Death of Woodbridge, John Organ in his Turn presented Thomas Hotchkis; and afterwards Richard died, and John Organ survived, and that Richard's Moiety descended to his Brother, who granted the Advowson to Richard Hippesly, from whom it descended to John Hippesly his Brother, who granted the next Avoidance to William Phillips the Plaintiff's Testator, in whose Life-time the Church be-

T t t

came

came void by the Death of Hochkiss, and for that Reason it belonged to the said Testator to present, &c. and that the Defendants ipsum injuste impediverunt, and that the Testator died whilst the Church was void, having made the Plaintiff Executor, & as ratione it belonged to him to present.

27 Ed. 3. 8. b.
Co. Litt. 164.
b.

Now it was insisted on for Error, that the Plaintiff had no Title, even by his own Shewing, because the Jointenancy was not severed by this Indenture of Agreement made between Richard and John Organ, for that the Operation of that Deed was only by Way of Covenant, and the Inheritance of the Abbotsdon remained entire, as before, for Jointenants cannot grant to one another, tho' they may release; but this Deed could not operate by Way of Release, because then they must be cross Releases, and both at the Instant of Time.

3 H. 7. 8.
Co. Litt. 198.
a.

But if it should be admitted, that after this Indenture, Richard and John Organ were Tenants in Common, yet the Law would be against the Plaintiff, because Tenants in Common must join in their Presentation, and one Tenant in Common alone cannot grant the next Avoidance.

* 2 Mod. 97.

So that quacunq; vis data the Plaintiff had no Title, for it appears by his own Declaration, that John survived Richard Organ, under whom he makes his Title; and the Case of * Crossman and Churchill was cited as an Authority in Point.

11 H. 4. 3.
Co. Ent. 496,
590.
Dyer 29.
F.N.B. 62. D.
2 Inst. 365.

Sed per Curiam, This is a good Partition of the Inheritance of this Abbotsdon, for by this Agreement a separate Interest is vested in each of the Organs to present by Turns; and being executed on both Sides, the Inheritance is thereby severed.

Child *versus* Harvey.

1 Salk. 48.
Where the
Day of Nisi
prius was af-
ter the Day
in Bank, 'tis
not amend-
able.

MOVED to amend the Record of Nisi prius in the Jurata and Distringas, to make them agree with the Plea-Roll; the Mistake was this, (viz.) It was in Issue in B. R. of last Trinity-Term, in an Action laid in Middlesex, to be tried before the Chief Justice at Westminster, and the Day in Bank in the Jurata and Distringas, was a die Sanctæ Trinitatis, when it should have been a die Sancti Michaelis in tres septimanas Nisi prius, &c.

Now Tres Trin. which was the Day in Bank, happened to be on the 26th Day of June, vel coram Johanne Holt, &c. si prius venerit 27th of June, so that the Day of nisi prius was after the Day in Bank, when it ought to have been before.

The Plaintiff had a Verdict, but it was set aside, for this was not amendable, and if so, then the Chief Justice had no Authority to try the Cause.

Argent versus Sir Marmaduke Darrel.

ON a Trial at Bar in Ejectment, the Plaintiff had a Verdict contrary to the Opinion of the whole Court; and therefore the Defendant moved for a new Trial.

New Trial
not to be
granted
after a Trial
at Bar.

But per Curiam, a new Trial was denied, and it was laid down for a Rule, that after a Trial at Bar, no new Trial shall be granted in any Case, unless it appeareth that there hath been some Corruption or Misdeemeanor in the Jury.

D E

Term. Sanct. Hill.

11 Willielmi 3. B. R.

The King *versus* Chandler. Antea 501.

See Antea
501.
The Method
of Proceed-
ings against
Deer-steal-
ers.

CHANDLER was committed by a Justice of Peace upon a Conblation grounded on the Statute 3 & 4 Will. cap. 10. made against Deer-stealing, and being brought up into B. R. by Habeas Corpus in Hillary-Term, 11 Will. the Court was moved, that he might be discharged, for that the Commitment was illegal for the Reasons following.

(1.) Because the Method intended by this Statute was not pursued; for the Warrant to distrain was directed to all Constables generally; now upon such Direction to them by Name of their Office, a Warrant cannot be executed by any Constable out of the Precincts of his own Parish, for he is a Constable no where else.

Now upon this Warrant, the Constable of Southmims hath made a Return, that the Defendant had nothing in Hadley where by he might be distrained, or elsewhere: Whereas Hadley is another Parish, where the Constable of Southmims hath nothing to do; therefore such a Return of a Matter out of his Precinct was not sufficient whereon to ground a Warrant of Commitment.

(2.) If the first Warrant to distrain had been formal, yet the Return upon the Habeas Corpus is ill, for there is only a Recital of the first Warrant made in the Warrant of Commitment, but no Record thereof certified as it ought,

& per Curiam, for these Reasons the Commitment is void.

Et per Holt Chief Justice, the Method of Prosecution upon this Statute must be thus :

1st. The Person convicted if present may be detained in Custody for two Days, in which Time the Justice ought by Warrants, &c. at his Discretion, to make what Enquiry he can, so as to inform and satisfy himself whether the Penalty may be levied by Distress.

And if he finds that there is nothing to distrain, then he must make a Record thereof by Way of Adjudication, (viz.) That it appearing to him the Party hath not any Goods by which the Penalty may be levied by Distress; therefore in Pursuance of that Statute, he doth award him to Prison (at the End of two Days, but not before).

If the Person is absent when convicted, then the Justice must make a Warrant to distrain; and if there is nothing upon which a Distrain may be made, then after two Days he must make a Record thereof *ut supra*, and then issue out his Warrant of Commitment; wherefore Chandler was discharged.

Nota; These Warrants to distrain and commit, were made by the Recorder of London, who convicted the Defendant.

Starke & al' *versus* Cheesman. Intratur Trin. 11 Will. 3. but adjudged in Hill. Term, 11, 12 Febr. 1699.

CASE upon a Bill of Exchange drawn by the Defendant Christopher Cheesman in Virginia upon Christopher Cheesman of Ratcliff, London, which in Truth was upon himself; and in this Action the Plaintiffs declared, that the Defendant Christopher Cheesman 10 Junii, anno 1692. in quodam loco vocat' Virginia in partibus transmarinis, scil't, apud London' in parochia, &c. secundum usum mercatorum fecisset tres Billas excambii, all of them of the same Date and Contents, and directed the said Bills to Christopher Cheesman in Ratcliff; and by the second of the said Bills he requested the said Christopher after 20 Days Sight thereof (the first and third of the said Bills not being paid) to pay to the Plaintiffs 15 l. for like Value received at Virginia.

Case upon a Bill of Exchange protested.

Cum-

Cumque etiam prædict' C. C. unto whom the said Bill was directed, from the Time of making the said Bills, usque & super 22 die Decembris Anno 1699. at Ratcliff aforesaid, seu alibi infra hoc regnum Angliæ non fuit inventus & prædict' quindecim libræ in Billa prædicta mentionat' were not paid to the Plaintiffs, per quod prædicto 22 die Decembris Anno 1699. prædicta secunda Billa billarum illarum debito modo & secundum consuetudinem mercatorum protestat' fuit per quod secundum usum mercatorum the Defendant became and is chargeable to pay the Money to the Plaintiffs, who likewise declared upon an Indebitatus assumpsit, quantum meruit and insimul computasset, and had Judgment by Default; and upon a Writ of Inquiry executed entire Damages were found.

And upon a Motion in Arrest of Judgment, it was objected against the Declaration, for that it was not therein averred, that the first and third Bill of Exchange was not paid, which ought to be averred, because the Bills are conditional. (viz.) To pay the second Bill, if the first and third was not paid.

To which it was answered, That the Allegation that the Money in Billa prædicta mentionat' was not paid, did supply the Want of that Averment, because the Sum was the same in all the Bills.

(2.) It was objected, That to entitle the Plaintiffs to a Protest, they had only said, that the Person upon whom the Bill was drawn non fuit inventus in so long a Time, without shewing that they had made an Enquiry after him.

To which it was answered, That it was according to the Custom amongst Merchants, and according to the common Form in the like Cases.

(3.) It was objected, That the Plaintiffs had not laid in their Declaration, that the Defendant promised to pay the Money to them after the Protest made, or that he had any Notice of the Protest.

But it was answered, That the Law did raise the Promise upon the Custom of Merchants; and therefore it was not necessary of laying an actual Promise, and the Cases in the * Margin were cited as Authorities in Point.

Judgment for the Plaintiff.

1 Sid. 160,
306.

* 2 Cro. 306.
Cro. Car. 301.

Gage *versus* Acton. Intratur Hill. 8 Will. 3.
B. R. Rot. 293. *Adjudged* Hill. 11 Will. 3.

Action of Debt for Rent upon a Demise of Lands by Indenture made by the Plaintiff to John Acton, the Defendant's late Husband, who died Intestate, and the Action was brought against the Defendant Elizabeth Acton, as Administratrix.

1 Salk. 325.
Where a
Bond with a
Condition,
&c. given to
a Feme sole
is not dis-
charged by
her marry-
ing the Ob-
ligor.

Contra per
Holt Ch. Just.

The Defendant pleaded in Bar, that before her Inter-marriage with the said John Acton, he by his Writing obligatory became bound to the said Elizabeth, whilst sole, by the Name of Elizabeth Reynolds, Spinster, in the penal Sum of 1000 l. solvend. eidem Elizabethæ cum inde postea requisit. esset cum conditione prædict. scripto obligatorio subscript. recitando, That whereas a Marriage was intended between the said John and Elizabeth, then if the said Elizabeth should happen to survive the said John, and he to die before her, then if the said John Acton should leave, or if his Heirs, Executors or Assigns should pay to the said Elizabeth, her Executors, Administrators or Assigns, the full Sum of 1000 l. within one Month after the Death of the said John Acton, then the Bond to be void.

That afterwards the Marriage did take Effect, and John Acton died Intestate, and did not leave to the said Elizabeth the Sum of 1000 l. or one Penny thereof; and that since his Death the Sum of 1000 l. or any Part thereof, hath not been paid by the Heirs or Assigns of the said John; and that on such a Day, &c. Administration of the Goods and Chattels of the said John was by such, &c. committed to her; and that afterwards several of the Goods, &c. which were her Husband's Goods, to the Value of 130 l. and no more, came to her Hands, which Goods she doth retain in Part of Satisfaction of the Bond aforesaid.

And upon a Demurrer to this Plea, two Points were made,

(1.) Whether a Debt due for Rent reserved upon a Demise by Deed was superior to a Debt on a Bond, be-
cause

Debt due for
Rent, and
Debt due on
a Bond are
in equal De-
gree.

cause the Rent issues out of the Realty, or whether those Debts are in equal Degree.

And as to this Point the Court was unanimous in Opinion, that these Debts were in equal Degree, and that the Law was the same if the Rent had been reserved upon a Parol Lease, because it issues out of the Realty.

(2.) The other, which was the chief Point, was, Whether the Intermarriage of the Obligor with the Obligee had extinguished the Debt, or not.

And after several Arguments at the Bar, the Court consisting of three Judges, gave their Opinions seriatim, and Gould and Torton Justices, were of Opinion, that the Bond was not destroyed, nor the Debt extinguished by the Marriage.

They agreed, that all Contracts and Debts in present, tho' they are to be performed or paid in futuro, especially if a certain Day of Payment is prefixed, such are all extinguished by the Intermarriage; nay, if 'tis upon such a Contingency which might possibly happen during the Coverture.

But there are several Things, which upon several Occasions are kept in custodia Legis, to preserve a Right; and a Suspension of a personal Action doth not always extinguish that Action.

Modus & conventio vincunt Legem, and no Fiction of Law shall work a Wrong; if a Feme Executrix marryeth the Debtor, yet the Law preserves the Debt, least a Wrong should happen to the Creditors.

Now in the principal Case, this Bond was a Provision for the Wife in the Personalty, which the Law will preserve for her Livelihood, as well as it preserves her Dower, which is in the Realty.

Where the Debtee takes the Debtor to be her Husband, 'tis reasonable that the Debt should be extinguished, because it seems to be the Agreement of the Parties, that it should be so; but here 'tis expressly against the Intent of the Parties, that the Debt should be extinguished, and therefore the Law will preserve it, and not work a Wrong.

That there is no Difference in Reason between a Bond with a Condition before Marriage, and a Promise or Covenant before Marriage; and by the Cases in the

Dyer 6, 7.
Moor 236,
855.
8 Rep. 134.
Sir John
Needham's
Case.
Cro. Car,
371. Webb
v. Dorchester

* Margin it appears, that a Release of all Demands will not release a Bond with a Condition, upon a Contingency, and not broken.

* Hob. 136,

216.

2 Roll. Abr.

407.

2 Cro. 170.

Litt. Rep. 87. Hutt. 17. Sid. 58, 59.

But Holt Chief Justice was of a contrary Opinion, because this was in the Case of a Bond with a Condition, which was distinct from the Bond, and therefore immediately upon the Execution of the Bond there was a Debt in presenti, which still exists, and the Condition is subsequent to the Bond; and he relied upon † Hoe's Case, † 5 Rep. to make out the Difference between a Covenant, a Promise, and a conditional Bond, and a Bond with a Condition in Nature of a Defeasance; for in an Action on this Bond, if the Defendant doth demur, the Plaintiff will have Judgment without shewing a Breach.

If this Bond had been given by a Stranger to the Woman when sole, the Husband might have released it by the Words of all Debts and Demands; and this Bond is the same as if it had been single and a Defeasance by another Deed; for the Condition thereof is not the Thing releasable, but the Bond, which is a Duty in presenti; and he agreed the Cases of Promises and Covenants before Marriage, but insisted that this was different.

But by the Opinion of the other two Judges, the Defendant had Judgment, upon which a Writ of Error was brought in the Exchequer-Chamber; but the Plaintiff in Error perceiving the Court enclined to affirm the Judgment, did not proceed.

Nota; It was said by Holt Chief Justice, That if an Action should be brought on this Bond, and the Defendant demur to the Declaration, the Plaintiff shall have Judgment without shewing any Breach, but that must be if the Defendant pray Oyer of the Bond and Condition, and 'tis entered in hæc verba, for then the Condition is Parcel of the Defendant's Declaration, and not of the Defendant's Plea, and then if the Defendant demur, Judgment shall be against the Plaintiff, if by the Condition it appears he had no Cause of Action.

Hiliard *versus* Jennings. Intratur Trin. 10
Will. 3. B. R. *Adjudged this* Hillary-Term.

A Will was
attested by
three Wit-
nesses, of
which the
Devisee was
one, he is no
good Wit-
ness.

THIS was an Issue directed out of Chancery to try
the Validity of a Will, and the Jury found a spe-
cial Verdict.

It. That Thomas Jennings was seized in Fee of the
Lands in Question, lying in Somersetshire; and being of
the Age of twenty-one Years, he by Will dated 17 April,
1695, (which they found in hæc verba) devised the said
Lands to his Cousin William Hilyard (the now Plaintiff)
whom he made sole Executor thereof.

They found likewise, that the said Thomas Jennings
signed, sealed, and published that Will in the Presence of
the same William Hilyard, Walter Lewis and Elizabeth
Bernard, and no other Person, and that those three Wit-
nesses did subscribe their Names as Witnesses to the said
Will, and attested the same in the Presence of the said
Thomas Jennings the Testator.

The Question was, Whether this was a good Will,
quoad the Devise of the Lands to the Plaintiff within
the * Statute of Frauds, by which 'tis enacted, that a
Will by which Lands are devised must be subscribed and
attested in the Presence of the Testator, by three or four
credible Witnesses.

And upon the first Argument the Court was of Op-
nion, that this Will was void quoad the Devise of the
Lands to the Plaintiff, because he being the Person to
whom the Lands were devised, cannot by Law be allow-
ed to be a credible Witness to prove the Execution of
the Will on his own Behalf; wherefore with Respect to
this Devise, the Will was attested only by two Witnesses,
which is not sufficient to answer the Statute; and,

Judgment was given for the Plaintiff.

* 29 Car. 2.
cap. 3.

The Case of Bridewel Precinct.

ONE who had been an Apprentice for seven Years to a Master of Bridewel Hospital, and being out of his Time, and having received the 10l. Charity Money towards setting up his Trade according to the Institution of the Hospital, removed from thence, and set up his Trade in Clerkenwel, where he married, and had Children; and now being chargeable to that Parish, was by the Order of two Justices sent to the Precinct of Bridewel, as being the Place of his last legal Settlement; and it being recited in the Order, that Bridewel was extraparochial, for that Reason this Order was quashed, because the Statutes concerning Settlement of the Poor do not extend to extraparochial Places, but that is *Casus omissus*.

Extraparochial Places may be taxed to contribute to the Relief of the Poor.

Sed per Holt Chief Justice, extraparochial Places may be taxed by way of Contribution in Aid of a Parish overcharged with the Poor.

Dodson versus King.

THE Plaintiff having obtained a Judgment in the original Action (wherein there was special Bail given by the Defendant) brought an Action of Debt against the Bail upon their Recognisance.

The Defendants in this Action of Debt pleaded, that no *Ca. sa.* had issued against the Defendant in the original Action.

The Plaintiff replied and set forth the *Ca. sa.* and the Return thereof; and thereupon the Defendants (the Bail) demurred.

And afterwards upon a Motion, the Court being acquainted that the Defendants (the Bail) had rendered the principal Defendant in Discharge of their Recognisance before the Return of the *Lacitat*, upon which they were arrested, and praying that they might have the same Privilege in this Action of Debt brought against them, as they should have, if the Plaintiff had proceeded against them according to the usual Course, by way of *Sci. fa.* upon the Recognisance, (and not by way of Action of Debt,) wherein upon

Debt upon the Recognisance against the Bail, who had rendered the Principal before the Return of the *Lacitat* against him, which Render is good, as a Render before the Return of the second *Sci. fa.*

Motion they may render the Body at any Time before the Return of the second Sci. fa.

Upon Debate of this Matter, the Court was of Opinion, that for as much as the Bail (who were Defendants in this Action of Debt) had rendered the Body of the principal Defendant before the Return of the Latitat (in this Action) upon which they were arrested, the Bail ought to be discharged from their Recognisance; for a Render before the Return of the Latitat in an Action of Debt upon such a Recognisance is equivalent to a Render before the Return of the second Sci. fa. when the Plaintiff proceeds that Way, and accordingly the Rule was to stay the Plaintiff from any farther Proceedings in this Action, and to enter an Exoneretur upon the Bail-Piece, notwithstanding the Plea, Replication and Demurrer before this Motion.

Bedingham and Kingston Bowsey, *Parishes*
in *Sussex*.

Order of Removal confirmed on an Appeal is final as to the contending Parishes only.

A Poor Man by the Order of two Justices was removed from the Parish of St. M. to the Parish of Kingston Bowsey as the Place of his last legal Settlement, from which Order Kingston appealed to the next Quarter-Sessions where this Order was discharged.

Afterwards this poor Man went to Bedingham, from whence by another original Order of two Justices he was again removed to Kingston Bowsey, which last Order being removed by Certiorari into B. R. it was now moved, that it might be quashed, because upon the Appeal Kingston had been discharged, which could not be, if that had been the last Place of his lawful Settlement; therefore it was insisted that Kingston was finally acquitted.

Sed per Curiam, The Order made upon the Appeal is final to none but to the contending Parishes who were Parties to the Appeal, and not to Strangers, as Bedingham is in this Case.

Creamer

Creamer *versus* Wickett.

IN an Action of Battery and false Imprisonment brought
in B. R.

The Defendant pleaded in Abatement, another Action depending for the same Matter, in the same Court.

The Plaintiff replied, Quod non habetur aliquod tale Recordum & petit quod Recordum illud, &c. inspiciatur, without giving Liberty to the Defendant to rejoin quod habetur tale Recordum.

And upon a Demurrer to this Replication, the Plaintiff had Judgment, because this being a Record of the same Court in which it was pleaded, the Plaintiff might pray, that it might be inspected by the Court, if any such there was as 'tis reported in * Dier, which was the Precedent by which the Plaintiff was guided in this Case.

Et per Curiam, Upon this Plea the Plaintiff might have prayed Oyer of the Record pleaded, and for Want of Oyer might have signed Judgment, which is the quickest Method of Proceeding.

Plea in Abatement, that there is another Action depending for the same Matter in the same Court.

* Dier 227, 228.

D E

Term. Paschæ.

Anno 12 Willielmi 3. B. R.

Clay *versus* Snelgrove.

1 Salk. 33.
Prohibition
to a Suit in
the Admi-
ralty on
Suggestion,
that the
Contract
was made
at Land.

THE Administrator of a Master of a Ship libelled for Wages in the Admiralty Court, which were due to the said Master and his Man; and also for Money paid by the Master to the Mariners for their Wages.

And upon a Motion, the Question was, Whether a Prohibition should go upon the common Suggestion, that the Contract was made on Land.

It was agreed, that if the Mariners had libelled for Wages, no Prohibition should go, but this being for the Wages of the Master who is not shipped as the Mariners are upon a general Undertaking of the Master; but he comes in by a special Contract by Charter-Party with the Owners, and his Remedy for his Wages is by Action against them.

But in this Case it happened, that the Owner was beyond Sea, and the Counsel for the Administrator insisted, that no Prohibition might go, unless some sufficient Person would appear and put in Bail in an Action to be brought against him; otherwise this Debt might be lost; the Court thought it was reasonable so to do; but afterwards a Rule was made for a Prohibition absolutely without any Condition.

Tilney

Tilney *versus* Norris. Intratur Trin. 9 Will. 3.
B. R. Rot. 182.

AN Action of Covenant was brought against the Defendant as Assignee of Lessee for Years, reciting the Lease made to E. G. &c. *cujus status & residuum termini Annorum, &c. devenit* (to the Defendant) per assignationem; and the Lessee having covenanted in this Lease to repair, the Breach assigned against the Defendant was for not repairing, &c. and in Evidence upon the Trial of the Cause it appeared, that the Defendant was only Administrator to the Assignee of the Lessee, and that by Virtue of such Administration he entered and was possessed; and the Premises being out of Repair, this Action was brought against him as Assignee, and not as Administrator.

Covenant against Assignee of Lessee for Years, who in Truth was Administrator of the Assignee, but sued as Assignee, and held good.

And it was made a Case for the Opinion of the Court, Whether this Action was well brought against him as Assignee; for if it was, then he is chargeable *de bonis propriis*, and not *de bonis intestati*; and it was adjudged for the Plaintiff, that the Action was well brought against the Defendant, by the Name of Assignee.

Moor 399.
5 Rep. Hargrave's Case.
W. Jones 245.
Allen 42.

Duke of Ormond *versus* Bierly, Intratur Pas.
11 Will. 3. B. R. Rot. 76. *Adjudged* Pas. 11.

AN Action was brought upon a Bond in Replevin to prosecute his Suit with Effect, and also to make Return, &c.

1 Salk. 99.
What shall be a Prosecution with Effect.

The Defendant pleaded, that E. G. did levy a Plaint in Replevin in the Court before the Steward of Westminster, and that afterwards, and before the Suit was determined, (*viz.*) On such a Day, &c. E. G. died, per quod the Suit abated.

The Plaintiff replied, quod bene & verum est, that E. G. levied such a Plaint against the Defendant, who immediately afterwards exhibited an English Bill in Exchequer against the Plaintiff in that Suit, and by Injunction hindered the Proceedings below until such a Day, &c. on which Day the said E. G. died, so that he did not prosecute his Suit with Effect.

And

And upon a Demurrer to this Replication the Defendant had Judgment, for per Holt Chief Justice, This was a Prosecution with Effect, because there was neither a Nonsuit or Verdict against E. G. and so 'tis upon a Recognizance on a Writ of Error, which is also to prosecute with Effect; if the Plaintiff is not nonsuit, nor the Judgment affirmed, the Recognizance is not forfeited.

Tonkyn versus Crocker.

2 Salk. 604.
Lutw. 1211.
The same
Names, but
not the same
Point.

Amendment
not allowed
to be made
by the In-
structions of
the Curfitor.

* 1 Roll.
Abr. 734.
28 H. 6. 12.
Dyer 206.
2 Cro. 234.
1 Leon. 134.
See Black-
more's Case.

WRIT of Error of a Judgment in C. B. the Writ recited the Loquela to be in Curia nostra, when it was a Loquela in the Time of the King and Queen.

And now it was insisted, that this Writ might be amended by the Instructions to the Curfitor who made it out, which being produced in Court, appeared to be right.

But this was opposed by the Counsel on the other Side, for that this Writ could not be amended by the Statute 8 H. 6. 'tis true, that Statute gives the Justices Power to amend Writs and Records, where it shall appear to them to be the Disposition of the Clerk, but then such Amendment must be in * Affirmance of the Judgment; but this to reverse the Judgment.

This Writ, as it now stands, is a good Writ, and needs no Amendment; but 'tis an Alteration, and not an Amendment, which is desired on the other Side, for a wrong Record is now returned; and if the Writ is altered to the Record, then it would be a right Record, the Consequence whereof will be, that here will be a Record or no Record, according to the Alteration, or no Alteration of the Writ.

Thereupon the Court denied to alter it.

T H E T A B L E.

A.

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Where Matter is pleadable in Abatement, the Benefit of it is lost, if the Party pleads to Issue. 16

Judgment to answer over upon a Plea in Abatement; then the Defendant pleaded *non assumpsit*, and had a Verdict, but could not get Judgment, because in the Record of *Nisi prius* there was no Mention of the Plea in Abatement, which was men-

tioned in the Plea-Roll, so it did not warrant the *Nisi prius* Roll. Page 447

Plea in Abatement ought to conclude & *petit judicium de Billa* & *quod Billa illa cassetur*, and not *petit judicium si ille ad Billam predictam respondere compelli debeat*, because such Plea is proper to a Plea in Non-ability, or to the Jurisdiction of the Court. 363, 364

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X x x

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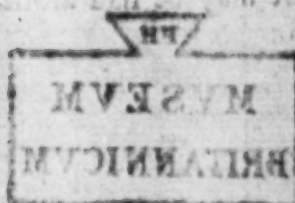
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